Supreme Court of the United States.

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FILED
DEC 29 1904
JAMES H. McKENNEY,
Clerk.

OCTOBER TERM, 1904.

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No. 360.

THE SCOTTISH UNION AND NATIONAL INSURANCE COMPANY,
Appellant,

versus

WILLIS G. BOWLAND, as Treasurer, and L. EWING JONES, as Auditor of Franklin County, Ohio; ARTHUR I. VORYS, as Superintendent of Insurance, and WILLIAM S. McKINNON, as Treasurer of the State of Ohio,
Appellees.

No. 361.

WILLIAM G. BOWLAND, as Treasurer, and L. EWING JONES, as Auditor of Franklin County, Ohio, et al,
Appellants,

versus

THE SCOTTISH UNION AND NATIONAL INSURANCE COMPANY,
Appellee.

Appeals from the Circuit Court of the United States for the Southern District of Ohio.

Brief for Appellants.

JUDSON HARMON,
W. O. HENDERSON,
HARTWELL CABELL,
For Appellants.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

THE SCOTTISH UNION AND NATIONAL INSURANCE COMPANY,

Appellant.

No. 360. *versus*

WILLIS G. BOWLAND, as Treasurer, and L. EWING JONES, as Auditor of Franklin County, Ohio; ARTHUR I. VORYS, as Superintendent of Insurance, and WILLIAM S. McKINNON, as Treasurer of the State of Ohio,

Appellees,

WILLIAM G. BOWLAND, as Treasurer, and L. EWING JONES, as Auditor of Franklin County, Ohio, et al,

Appellants,

No. 361. *versus*

THE SCOTTISH UNION AND NATIONAL INSURANCE COMPANY,

Appellee.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

Brief for Appellants.

The Scottish Union & National Insurance Company filed its bill in the Circuit Court of the United States for the Southern District of Ohio, Eastern Division, to enjoin various state and county officers of Ohio from the levy and collection of taxes on bonds of the complainant deposited as required by law.

The defendants demurred (R., pp. 13 and 16). The court sustained the demurrers in part and overruled them in part, holding that the bonds were taxable and that the tax on them might be collected by distraint, but that no personal judgment could be obtained therefor, and enjoining the prosecution of suits for that purpose as prayed. He also held that the tax for one of the years involved was improperly assessed. From the decree rendered accordingly both parties have appealed.

STATEMENT OF FACTS.

The Scottish Union & National Insurance Company is a corporation organized under the laws of Great Britain, with its home office in Edinburgh, Scotland, and its chief office in the United States, from which it conducts all its business in Ohio, in the city of Hartford, Connecticut.

Under Section 3660 of the Revised Statutes of Ohio, as amended in 1894 (91 Ohio Laws, 40) this company on September 14th, 1894, deposited with the Superintendent of Insurance of the State of Ohio fifty thousand dollars ($50,000), par value, and on November 7th, 1894, an additional fifty thousand dollars ($50,000), par value, of municipal bonds of the county of Lucas, in the state of Ohio.

Section 3660, as amended in 1894, reads as follows:

> "Section 3660. (Certain companies must make deposit.) A company incorporated by or organized under the laws of a foreign government shall deposit with the superintendent of insurance, for the benefit and security of the policy-holders residing in this state, a sum not less than one hundred thousand dollars in stocks or bonds of the United States, or the state of Ohio, or any municipality or county thereof, which shall not be received by the superintendent at a rate above their par value; the stocks and securities so deposited may be exchanged from time to time for other like securities; so long as the company so depositing continues solvent and complies with the laws of this state, it shall be permitted by the superintendent to collect the interest or dividends on such deposits; and for the purpose of

this chapter the capital of any foreign company doing fire insurance business in this state shall be deemed to be the aggregate value of its deposits with the insurance or other departments of this state and of the other states of the United States, for the benefit of policy-holders in this state or in the United States, and its assets and investments in the United States certified according to the provisions of this chapter; but such assets and investments must be held within the United States, and invested in and held by trustees, who must be citizens of the United States, appointed by the board of directors of the company and approved by the insurance commissioner of the state where invested, for the benefit of the policy-holders and creditors in the United States; and the trustees so chosen may take, hold and convey real and personal property for the purpose of the trust, subject to the same restrictions as companies of this state."

The Lucas county bonds so deposited were not ordinary coupon bonds payable to bearer, but were registered under the provisions of Section 2711-20, Rev. Stat. Ohio, in the name of the Superintendent of Insurance, in trust for the benefit and security of the policy-holders of The Scottish Union & National Insurance Company residing in Ohio.

Section 2711-20 reads as follows:

"(2711-20.) Section 1. (Registration of bonds.) Any city, village, county or school district of this state, which has been or hereafter may be authorized to issue bonds, shall, on demand of the owner and holder of any of its coupon bonds heretofore or hereafter issued, issue in lieu thereof registered bonds of such city, village, county or school district; the owner and holder asking for exchange of bonds shall pay a reasonable compensation to cover expense of such exchange, which shall be of the same denomination, in excess of five hundred dollars, as the owner or holder may desire, bear the same rate of interest, and be payable at the same time, both as to interest and principal, as the coupon bonds for which they are exchanged; such coupon bonds, when so exchanged, shall be canceled and filed in the manner provided for bonds redeemed; a book shall be kept in each of the offices of the auditor and treasurer of any such city, clerk and treasurer of any such village, auditor and treasurer of any such county, and clerk of

the board of education of any such school district, in which shall be entered the date, number, series, denomination, and owner of such registered bonds, and the number and series of the coupon bond for which it was exchanged; the interest and principal of such registered bonds shall, when due, be paid only to the order of the person, corporation or firm who appears by such books to be the owner thereof; and such registered bonds may be transferred on such books by the owner in person, or by a person authorized so to do by power of attorney, duly executed; and in such case the power of attorney shall be filed and carefully preserved in the office of the treasurer of any such city, village, county or school district, that the exchange and registering of bonds required by this act shall be transacted by the mayor and clerk of any such city or village, the auditor and treasurer of any such county, and the president and clerk of the board of education of any such school district, at their business offices, and they shall keep a registry for that purpose; that the exchange and registering of bonds required by this act shall be transacted by the trustees of the sinking fund of such city at their business office, where a registry shall be kept for that purpose; * * * ".

The bonds so deposited and registered were, as is by law directed, delivered by the Superintendent of Insurance to the State Treasurer for safe keeping, and remained in the treasurer's office in Columbus, Franklin county, Ohio, from the time of their original deposit until they were finally withdrawn on April 2nd, 1903.

The Scottish Union & National Insurance Company has neither office nor managing agency in Ohio, and none of its general officers reside in the state. It conducts its business through local agents appointed for the sole purpose of soliciting and procuring insurance, and issuing policies. These agents report directly to the office of the company in Hartford, Connecticut.

No agent of the Company residing or doing business in Ohio had management or control in any way of the bonds deposited, and the interest on the bonds while on deposit was paid as it accrued directly to the Hartford office.

In September, 1900, a notice was served on one of the local agents of The Scottish Union & National Insurance Company, addressed to the company, and notifying it to appear before the Auditor of Franklin County and show cause why the said municipal bonds then on deposit in said county with the Treasurer of State should not be placed against it on the tax duplicate of that county and taxes collected thereon for the years 1895 to 1900, inclusive. Thereafter the said Auditor made the following entry upon the tax duplicate of Franklin County:

Owner's Name.	Year.	Value.	Rate.	Tax by Levy.	Special Tax.	Grand Total.
Scottish Union	1895	$100,000	2.70	$2,700		
and National	1896	$100,000	2.70	$2 700		
Insurance Co.	1897	$100,000	2.70	$2,700		
	1898	$100,000	2.75	$2,750		
	1899	$100 000	2 75	$2,750		
	1900	$100,000	2.75	$2,750	$817.50	$16,350. 817.50

On or about November 15th, 1900, the treasurer of said Franklin county brought a civil action against the company, praying judgment against it for the taxes so assessed with respect to said municipal bonds for the years 1895 to 1900, inclusive. This action, which was commenced in the Common Pleas Court of Franklin County, Ohio, is still pending.

On December 4th, 1903, notice was again served upon one of the local agents, addressed to the company, and notifying it to appear before the auditor of Franklin county and show cause why the said municipal bonds then on deposit in said county with the Treasurer of State should not be placed against it on the tax duplicate of that county and taxes collected thereon for the years 1901, 1902 and 1903. Thereafter the said auditor made the following entry upon the tax duplicate of Franklin county.

Owner's Name.	Year.	Value.	Rate.	Tax by Levy.	Special Tax.	Grand Total.
Scottish Union	1901	$100,000	2.85	$2,850		
and National	1902	$100,000	2.75	$2,750		
Insurance Co.	1903	$ 97,000	3.00	$2,910	$425.50	$8,510.
						425.50

On April 2nd, 1903, upon an application for leave to substitute theretofore made by the Scottish Union & National Insurance Company, the Superintendent of Insurance accepted from said company one hundred thousand dollars ($100,000) in bonds of the United States as a deposit under the provisions of Section 3660, and sent to the company at its office in Hartford, the municipal bonds whch had been deposited with him until that time.

On April 2d, 1904, the treasurer of Franklin County procured a warrant of distraint and under such warrant made demand upon the Superintendent of Insurance and the State Treasurer, for the United States securities belonging to the company, then on deposit with him, with the avowed intent of seizing and selling the same to pay the taxes which had been assessed against the said company with respect to the municipal bonds on deposit from 1895 until April 2d, 1903.

The bill filed April 20th, 1904, set out the facts as above stated, and prayed as follows:

> "Wherefore, complainant prays that the said defendant, Bowland, as treasurer of Franklin county, Ohio, be temporarily restrained from collecting, or attempting to collect, any of said pretended taxes against complainant personally; that said defendant, Bowland, be restrained from collecting, or attempting to collect, the said pretended taxes, or any portion of them, by distraint, against either said bonds of the United States so deposited as aforesaid, or any personal property of complainant which may now or hereafter be situate in the said county of Franklin, or the state of Ohio; that said defendants, Arthur I. Vorys, as superintendent of insurance, and William S. McKinnon, as treasurer of the state of Ohio, be temporarily restrained from delivering, or attempting to deliver, said bonds of the United States on deposit with them or any part of

same, to the said Willis G. Bowland, as said treasurer as aforesaid; and that, upon final hearing herein, said injunctions be made perpetual; and for such other and proper relief as equity and good conscience may require."

Upon argument the court below decided:

First—That the municipal bonds on deposit in Ohio were tangible personal property and taxed under the laws of the state.

Second—That the state had no power to make the taxes with respect to such bonds a personal charge upon a non-resident owner and that, therefore, the civil action brought to enforce payment of the taxes so assessed and pending in the Common Pleas Court of Franklin County against complainant should be restrained.

Third—That the United States securities deposited in lieu of the municipal securities in April, 1903, were liable for the taxes assessed against complainant with respect to the municipal securities, and the court therefore refused to enjoin the execution of the distress warrant.

Fourth—That the taxes assessed against complainant with respect to the municipal bonds for the year 1903 were improperly assessed and the court enjoined collection of those taxes.

The company appeals from the decree of the court below so far as it holds the municipal bonds to have been taxable under the laws of Ohio, and that the United States securities deposited in lieu of such bonds could be distrained for the collection of taxes levied with respect to the municipal bonds.

The treasurer and auditor of Franklin county cross-appeal from so much of the court's decree as denies the right of the State to institute a civil action in its own courts against a non-resident for the collection of taxes assessed against such non-resident with respect to property belonging to it and found in the state, and from so much of the decree as restrained the said officials from attempting to collect the taxes assessed against the said municipal bonds for the vear 1903.

ARGUMENT.

The discussion of the case presented by the Record naturally divides itself into a consideration of four questions:

First—Whether the municipal bonds deposited with the Superintendent of Insurance by foreign insurance companies, under the requirements of Section 3660, Rev. Stat. Ohio, are taxed by the laws of Ohio.

Second—Whether taxes assessed with respect to such deposits belonging to non-residents can be collected by a civil action instituted against the non-resident owner personally and independent of any proceedings *in rem* against property belonging to such non-resident.

Third—The municipal bonds formerly on deposit having been lawfully withdrawn from the State by the consent of its officers, whether the taxes levied with respect to them can now be collected by distraint or other proceeding *in rem* directed against the United States securities now on deposit and belonging to the same non-resident owner.

Fourth—Whether the taxes with respect to the bonds for the year 1903, the bonds having been removed from the state on the 2d day of April of that year, eleven days prior to the date upon which their return was required by law, if required at all, were lawfully assessed.

The court below held for the defendants on the first and third of these questions and for the complainant on the second and fourth.

I.

The Municipal Bonds Deposited With the Superintendent of Insurance by Foreign Insurance Companies Under the Requirements of Section 3660, Revised Statutes, Ohio, are not Taxed by the Laws of Ohio.

The precise question embodied in this proposition has been adjudicated by the U. S. Circuit Court of Appeals for the Sixth

Circuit, in the case of another company, *Western Assurance Company of Toronto* v. *Halliday*, 126 Fed. Rep., 257. The decision was adverse to the position of appellant in these cases. An argument of the proposition necessarily involves an analysis of the grounds upon which that decision was placed, since the same constitutional and statutory provisions having been there construed against us, the decision, if correct, is conclusive upon this point.

Much of Judge Lurton's opinion is devoted to a discussion of the *power* of the state to tax municipal securities under the circumstances of these deposits. The soundness of his conclusions in this respect is not questioned. We do not contend that the laws of the state could not have taxed bonds so deposited regarded either as tangible property, or as choses in action the paper evidences of which are within the state. We concede that *State Tax an Foreign Held Bonds case*, 15 Wall., 300, *Walker* v. *Jack*, 31 C. C. A., 462, *New Orleans* v. *Stempel*, 175 U. S., 309, *Blackstone* v. *Miller*, 188 U. S., 189, and other authorities are decisive, and that a state has the right to class municipal bonds as tangible personal property, and the power to tax them when found in the state. But the power of the state to tax, and the extent to which it has exercised that power by constitutional and statutory provisions are two different things; and we do contend that the State of Ohio by her constitution and statutes has elected to treat such securities, not as tangible property, but as a species of intangible property, depending for taxability, not upon the situs of the paper, but upon the situs of some person in Ohio sustaining a specified relation to the bonds; that as the constitution and statutes have been construed by the Supreme Court of Ohio, these requirements do not here exist; and that the decision in the Halliday case ignores the plain language of the laws and the decisions of that court which should be final upon the question.

The constitutional provision bearing upon the question is as follows:

Article XII, Section 2, of the Ohio Constitution of 1851,

> "Section 2. (Taxation by uniform rule.) Laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all the real and personal property, according to its true value in money; * * *"

This section of the constitution does not execute itself. The law of Ohio, as stated by Thurman, J., in *Lamb* v. *Lane*, 4 O. S., p. 167, is substantially that where the constitution prescribes the method of procedure that method must be pursued, and that in such case the constitution does not execute itself, but proper provisions must be made *by law*. To the same effect is *Chisholm* v. *Shields, Treasurer*, 67 O. S., 374, where the learned Chief Justice says (p. 377):

> "Section 2 of Article XII of the Constitution *imposes upon the General Assembly the duty of passing laws* taxing all property at its true value in money, with certain named exceptions."

The statutes which affect this section of the Constitution in so far as they bear upon the discussion, are as follows:

Section 2731, Revised Statutes of Ohio, reads as follows:

> "Section 2731. (Property subject to taxation * * *). All property whether real or personal in this state, and whether belonging to individuals or corporations; and all moneys, credits, investments in bonds, stocks, or otherwise of persons residing in this state, shall be subject to taxation, except only such as may be expressly exempted therefrom; and such property, moneys, credits, and investments shall be entered on the list of taxable property as prescribed in this title; * * *"

Section 2734, Revised Statutes of Ohio, reads as follows:

> "Section 2734. (Who shall list personal property.) Every person of full age and sound mind shall list the personal property of which he is the owner, and all moneys in his possession, all moneys invested, loaned or otherwise controlled by him, as agent or attorney, or on account of any other person or persons,

company or corporation whatsoever, and all moneys deposited subject to his order, check, or draft, and all credits due or owing from any person or persons, body corporate or politic, whether in or out of such county; * * * the property of every ward shall be listed by his guardian, * * *; of every person for whose benefit property is held in trust, by the trustees; * * * of every company, firm, or corporation by the president or principal accounting officer, partner or agent thereof; * * *"

Section 2735, Revised Statutes of Ohio, reads as follows:

Section 2735. (Where personal property shall be listed.) Every person shall be required to list property on behalf of others shall list the same in the same township, city, or village in which he would be required to list it if such property were his own; but he shall list it separately from his own, specifying in each case the name of the person, estate, company or corporation, to whom it belongs; * * *"

Section 2744, Revised Statutes of Ohio, reads as follows:

"Section 2744. (Corporations generally; their returns.) The president, secretary and principal accounting officer of every * * * insurance company, * * * or other joint stock company except banking or other corporations whose taxation is specifically provided for, for whatever purpose they may have been created, whether incorporated by any law of this state or not, shall list for taxation, verified by the oath of the person so listing, all the personal property which shall be held to include all such real estate as is necessary to the daily operations of the company, moneys and credits of such company or corporation within the state, at the actual value in money, in manner following; in all cases returns shall be made to the several auditors of the respective counties where such property may be situated, together with a statement of the amount of said property which is situated in each township, village, city or ward therein. The value of all movable property shall be added to the stationary and fixed property and real estate, and apportioned to such wards, cities, villages, or townships, pro rata, in proportion to the value of the real estate, and fixed property in said ward, city, village or township, and all property so listed shall be subject to and pay the same

taxes as other property listed in such ward, city, village or township. * * * Provided, that nothing in this section shall be so construed as to tax any stock or interest in any joint stock company held by the state."

Section 2745, Revised Statutes of Ohio, before the amendment of April 29, 1902, reads as follows:

"Section 2745. (Returns by foreign insurance companies.) Every agency of an insurance company incorporated by the authority of any other state or government, shall return to the auditor of each county in which such company does business, or from which it collects premiums, on or before the first day of May, annually, the amount of the gross premium receipts of such agency for the previous calendar year in such counties; provided, however, that in the case of regular companies, wherein policy holders participate in the surplus and earnings of the company, dividends or surplus from previous payments allowed and used in the payment of current premiums, cancellation or surrender values and commissions paid to the citizens of this state during the same period, for which receipts are reported, shall be deducted from such gross receipts, and the net amount after such deduction shall be the basis of taxation for such companies in the counties, which shall be entered upon the tax list of the proper county and shall be subject to the same rate of taxation for all purposes that other personal property is subject to at the place where located; * * * And it shall be the duty of the Superintendent of Insurance, in the month of December, annually, to charge and collect from all such companies, such a sum as, added to the sum paid to the county treasurers, will produce an amount equal to two and one-half per cent. on the gross premium receipts of such companies, as shown by their annual statements under oath to the insurance department; * * * All taxes collected under the provisions of this section by the Superintendent of Insurance shall be paid by him, upon the warrant of the auditor, into the general revenue fund of the state."

Section 2746, Revised Statutes of Ohio, reads as follows:

"Section 2746. (In whose name property to be listed; but stock in companies which make return of capital not to be listed by shareholder.) Personal property of every description, moneys and credits, in-

vestments in bonds, stocks, joint stock companies, or otherwise shall be listed in the name of the person who was the owner thereof on the day preceding the second Monday of April in each year; but no person shall be required to list for taxation any share or shares of the capital stock of any company, the capital stock of which is taxed in the name of such company."

Article XII, Section 2, of the Ohio Constitution quoted above, enumerates the subjects of taxation, They are "moneys," "credits," "investments in bonds, stocks, joint stock companies or otherwise," and also "real property," and "personal property."

Section 2731, *supra*, which is the declaratory enactment of this constitutional provision specifying what property shall be taxed, repeats the classes there enumerated, with the greater amplification to be expected in a statute by expressing what was manifestly understood in the Constitution, viz., that the taxing power was to be exercised only on subjects within the state. The statute declares as subjects of taxation all real and personal property *in the state*, and all moneys, credits, investment in bonds, stocks or otherwise, *of persons residing in the state.*

Section 2730, Revised Statutes of Ohio, more particularly defines the general subjects mentioned in Section 2731, defining investments in bonds as follows:

> "Section 2730. * * * The terms, 'investment in bonds' shall be held to mean and include all moneys in bonds, or certificates of indebtedness, or other evidence of indebtedness of whatever kind, whether issued by incorporated or unincorporated companies, *towns*, cities, villages, * * * *held by persons residing in this state, whether for themselves or others;* * * * "

It is apparent that taking this enumeration in the ordinary legal sense, the same thing might be regarded indifferently as a "credit," an "investment in bonds" or "personal property." The proposition of law under discussion depends for solution upon the answer to the question whether by the constitution and the language of Section 2731 it was intended that a given piece of property, say a bond, could be taxed indiscriminately

as either a "credit," an "investment in bonds," or "personal property," or that each kind of property so enumerated should be taxed under its appropriate class, or not at all.

The decision of Judge Lurton in the Halliday case (*supra*) adopts the first alternative.

He said (p. 261):

> "The claim of the insurance company is in effect that investments in bonds and stocks, although actually having a situs in Ohio, are not subject to taxation as 'personal property' 'in this state' under the broad language of the first clause of Section 2731, and are only taxable, being an investment in bonds, when they are the bonds or stock 'of persons residing therein' within the meaning of the second clause of the same section. This amounts to a claim of exemption in favor of every form of personal property which may come under the classification of 'moneys, credits, investments in bonds, stocks, joint stock companies or otherwise' although having an actual situs in this state, unless they are the money, credits, bonds or stock 'of persons residing in this state.' In view of the constitutional requirement that laws shall be passed subjecting all real and personal property to taxation, it would seem more rational to construe the first clause of this section as subjecting every species of real and personal property to taxation if found 'in the state' and the enumerated kinds of personal property set out in the last clause without regard to any actual situs when owned by a 'person residing in the state.'"

This interpretation both of the constitutional provision and of the statute is in direct conflict with the decisions of the Supreme Court of Ohio. Instead of giving this broad meaning to "personal property" making it include "every species of personal property," Thurman, J., in construing this section of the Constitution in *Exchange Bank* v. *Hines* (3 Ohio St., 1, 39), says:

> "Although 'personal property' in legal signification, includes moneys and credits, it is apparent that wherever it is employed in this section it is used in a limited sense and does not include them."

And therefore, the court proceeded to say, the $200.00 worth of "personal property" of each citizen, declared exempt from execution or attachment by this same section, did not include credits or money, but was confined to "personal property" in this restricted sense.

In *Worthington* v. *Sebastian* (25 Ohio St., 1, 8), Welch, J., in delivering the opinion of the court, says:

> "Section 2, Article XII, of the State Constitution merely names the subjects of taxation and makes no limitation as to their *situs* or ownership. The subjects of taxation so named are 'moneys, credits, investments in bonds, stocks, joint stock companies or otherwise, and also real and personal property.' It declares that 'all' these subjects so named (except certain exempted items, which have no relation to the present case), shall be taxed by a uniform rule. * * Our system of an *ad valorem* taxation has uniformly proceeded upon the theory that *tangible* property is to be taxed according to the law of the place where it is situated, irrespective of the residence of its owner, while with *equal* uniformity it has proceeded upon the theory that 'credits,' 'investments in bonds,' 'stocks,' etc., are taxable according to the laws of the place where their owners or holders reside."

This language is conclusive, not only as to the *mutual exclusiveness* of the enumerated subject of taxation, but also as to the election of Ohio to treat "investments in bonds," for the purposes of taxation not as *tangible* but as *intangible* property, incapable of a situs apart from its owner or holder.

In *Myers* v. *Seaberger* (45 Ohio St., 232 at 234), the court say:

> "The subjects of taxation are enumerated in Section 2731 of the Revised Statutes. The language is as follows: 'All property whether real or personal in this state. * * * The first clause evidently embraces all *tangible* property, real or personal, situated in this state, irrespective of the residence of the owner, and the second clause embraces all *intangible* property of persons residing in this state, irrespective of where the sub-

> ject of the property may be situated. So that it seems clear that the *credits* of persons *not* residing in this state are not the subject of taxation by its authorities."

Yet credits as well as municipal or railroad bonds would fall within Judge Lurton's definition of personal property under his construction of the same section and could be taxed whenever the paper evidence is found in Ohio, although neither held or owned by a person in the state.

In *Brown* v. *Noble* (42 Ohio St., 405), the court say (p. 409):

> "* * * It seems clear to us that the situs of moneys, credits and investments for the purpose of taxation, is the residence of the person whose duty it is to list the same. * * *"

In *Sommers* v. *Boyd* (48 Ohio St., 648), the question was where certain credits should be returned for taxation, whether at the residence of the guardian who still held the personalty after the death of his ward, or the residence of the administrator of the ward's estate who did not have the actual possession of the personalty and who resided in another county. In deciding that they were to be returned not at the place where the credits actually were but in the county where the administrator resided, the court cite *Brown* v. *Noble* (*supra*) and hold that the domicile of the administrator furnishes the taxing situs of the credits. Referring to the fact that the credits were actually in possession of the guardian, the court say (p. 663):

> "The credits were not there, in the possession of any one clothed with the authority or charged with the duty of listing them; and the mere presence there of the evidences of the indebtedness, did not so fix the *situs* of the credits, as to require them, under the last clause of Section 2735, to be there listed for taxation."

In *Payne* v. *Watterson* (37 Ohio St., 121), these provisions of the constitution and statutes again came before the court. McIlvaine, J., delivering the opinion, said (p. 123):

"The subjects of taxation as enumerated in Section 2731 are 'all property, whether real or personal, and whether belonging to individuals or corporations; and all moneys, credits, investments in bonds, stocks or otherwise, of persons residing in this state.' 'Credits' are specifically named as a subject of taxation and 'investments in bonds' are also specifically named as another; and in Section 2730 the latter is defined as follows: 'the terms "investments in bonds" shall be held to mean and include all moneys in bonds, or certificates of indebtedness or other evidences of indebtedness of whatever kind, whether issued by incorporated or unincorporated companies, *towns, cities, villages, townships, counties, states* or other incorporations, or by the United States, *held by persons residing in this state, whether for* themselves or others.' Now by the common meaning of the words, the plaintiff's bonds are as clearly within the definition of 'investments in bonds,' here given as within the definition of 'credits' as above quoted; and if everything within the definition of 'credits' were to be taxed as credits and everything within the definition of 'investments in bonds' were to be taxed as investments in bonds, it would assuredly follow that the bonds of the plaintiff would be subject to double taxation. And again, this same section provides that 'the term "money" or "moneys" shall be held to mean and include any surplus or undivided profits held by societies for savings, or banks having no capital stock, gold and silver coin, bank notes of solvent banks, in actual possession, and every deposit which the person owning, holding in trust, or having the beneficial interest therein, is entitled to withdraw in money on demand'; while it is provided in Section 2737, that 'every person required to list property for taxation shall set forth in his statement, separately and distinctly, among other things, as follows: 'thirteenth, moneys on hand or on deposit, subject to order; fourteenth, the amount of credits as hereinbefore defined; fifteenth, the amount of all moneys invested in bonds, stocks, joint stock companies, annuities or otherwise.'

"Now, I shall be content to assume, at least until it shall be controverted, that the Legislature, by these provisions and definitions, *did not* intend to impose double or triple taxation; hence, it must be assumed, also, that the Legislature did not intend to embrace within the meaning of one of these terms property or things that were intended to be included in another. Therefore, it only remains to be determined whether

> the plaintiff's bonds must be included within the term 'investments in bonds' or within the term 'credits.' We think that they were the subject of taxation as 'investments in bonds,' which are defined by the statute to mean moneys in bonds. This conclusion is in accordance with the first and only meaning of the words. If these were not 'investments in bonds,' we can not conceive of anything that would be an investment in bonds. If these are not investments in bonds, these words in the statute are meaningless."

To reconcile the Halliday case with these decisions of the Supreme Court is impossible. Judge Lurton declares it to be permissible, for the purpose of taxation, to consider bonds either as tangible or intangible property. If actually in the state they may be treated as tangible and taxed as such, although not *owned* or *held* by any one in the state; if actually out of the state, but owned or controlled by some one in the state, then they may be treated and taxed as *intangible* property, and reached through their control or ownership.

To subject this conclusion to the test suggested by Judge McIlvaine in *Payne* v. *Watterson* accentuates its fallacy. Neither clause in the enumeration in Section 2731 of subjects of taxation has precedence over the others; they stand side by side in the same sentence. If several are taken to include the same property, the taxes may be assessed under any. Where the situs of the bonds happen to be the situs of the owner, double taxation would not probably result, but where the owner resides in one county of the state and the bonds are in another, either or both auditors may, in fact *must* tax the property, the one as tangible property situated in his county, and the other as intangible property owned by a person residing in his county.

In fact such an attempt was recently made and the Supreme Court of Ohio has again placed itself upon record as declaring investments in municipal bonds, for purposes of taxation, to be intangible property and incapable of a taxing situs in Ohio apart from an owner or holder.

The facts were these: A debenture company had deposited municipal bonds with the State Treasurer of Ohio for the security of its bond-holders under a statutory requirement similar to Section 3660. The company's home office, from which it managed its entire business was in Cincinnati, Hamilton County; the bonds were in the State Treasury in Columbus, Franklin County. It was therefore admitted that the bonds were liable for taxation in Ohio, the only question being where they should be returned for taxation. The Auditor of Hamilton County placed the bonds upon his duplicate on the theory that they were intangible property and their situs could only be at the home office of the company. The Auditor of Franklin County placed the bonds upon his duplicate upon the theory that they were either tangible property and the situs for taxation was the location of the bonds themselves, or else intangible property held by the State Treasurer as trustee. The case was first heard before a referee, who held, following the above and other decisions of the Supreme Court of Ohio, that the bonds were not *tangible* property. He further decided that they were not properly assessed against the State Treasurer, as a trustee holding the bonds in Franklin County, but should be taxed as intangible property in Hamilton County where the owner resided. This finding was affirmed by the Common Pleas Court and by the State Circuit Court, whose opinion is reported in *Sims, Treas.*, v. *Best* (1 Ohio Circuit Reports—New Series, 41; 25 Ohio Cir. Court Rep., 149). This decision of the Circuit Court was appealed from by the taxing officers of Franklin County and the case was pending in the Supreme Court of Ohio under the style *Heintz et al, Receivers*, v. *Cameron et al*, at the time the Halliday case was argued and decided by the United States Circuit Court of Appeals. After the Circuit Court of Appeals had decided the Halliday case, holding municipal bonds to be taxable as tangible property, the Supreme Court of Ohio affirmed the above decision of the State Circuit

Court without report (70 Ohio St., 491). The decision of the State Circuit Court, therefore, becomes that of the Supreme Court of Ohio. The State Circuit Court in that case says:

> "It is claimed that these bonds should be returned for taxation by the Treasurer of the State in the county where the safe of the Treasurer of the State is, and where these bonds are required to be kept, which is in Franklin County. On the other hand it is claimed that that the bonds should pay taxes in Hamilton County, in which county the principal office and main place of business is located.
>
> "The Court of Common Pleas held that the bonds were taxable in Hamilton County. We think the judgment of the court was right as to this.
>
> "We are clearly of the opinion that the bonds required by law to be deposited with the Treasurer of State, do not in any sense constitute him a trustee or owner in any sense. He has no right or control over these bonds, and not a particle of interest in them either as to principal or interest except as an officer of the state and as the custodian of them. The bonds are the property of the corporation, just as much after they are deposited with the State Treasurer as they were before. * * *
>
> "The bonds remained at all times the property of the company, and must be listed by it for taxation under Section 2735, R. S., at the place where the owner resides. The owner, in this case, is the corporation, and its residence for taxation is Cincinnati, Hamilton County, Ohio (37 O. S., 450).

The learned judge in the Halliday case, after reviewing the several sections of Ohio tax laws, further says (p. 262):

> "When the several sections are read and construed together it is obvious that the intent and purpose of the legislation is to subject to taxation every form of personal property having situs in this state, including such forms of personal property as money, credits, bonds, and stocks, *provided* only these latter are held or owned by a person residing in the state. If they are owned by a person residing in Ohio, they are subjected to taxation without regard to the place of their deposit or lodgment, but, if not owned by a person residing in the state, their taxability is made to de-

> pend upon their being 'held' in the state by some one residing therein, who holds and controls same for the non-resident owner as agent or otherwise."

We believe this is an accurate statement of Ohio tax law, entirely consistent with the utterances of the Supreme Court of the state. But the sentence that immediately follows indicates very plainly that the learned judge did not analyze the meaning of his language:

> "In the one case Ohio exercises its power to tax by reason of the presence of the property within the state and in the other by virtue of the domicile of the owner and the saying *mobilia sequuntur personam.*"

The two contrasted clauses in the sentence preceding this are: The one, taxation of moneys, credits, investments in bonds, etc., when *owned* by a person residing in the state, irrespective of the location of the paper evidences, and solely depending for taxing situs upon the residence of the owner in said state; the other, the taxation of moneys, credits, investments in bonds, etc., when *held* by a person residing in the state, equally irrespective of the location of the paper evidence and equally dependent for taxing situs upon the residence of the holder in the state. In neither case is a tax levied "by reason of the presence of the property," and especially is this true of property *held* within the state, as otherwise, a non-resident's property of this description would entirely escape taxation if the paper evidence thereof should be sent out of the state by the resident managing agent of the non-resident owner, although his control over the same continued in full force, a device which has been tried and held futile.

In the Halliday case, referring to the claim of appellant in that case, which is our claim here, that the subjects of taxation enumerated in the Constitution and statutes are exclusive and not over-lapping, the learned Judge says (p. 261):

> "This amounts to a claim of exemption in favor of every form of personal property which may come

> under the classification of 'moneys, credits, investment in bonds, stocks, joint stock companies or otherwise,' although having an actual situs in this state."

This statement of our position is inaccurate since it assumes the presence in the state of the paper evidences of such intangible property as equivalent to an actual situs of the property. What was urged in the Halliday case, and what we urge here, is that, irrespective of the actual location of the paper evidences, there could, under Ohio law as it now exists, be no taxing situs in Ohio of this class of property apart from a resident owner or holder. Waiving this criticism, the statement by Judge Lurton of our position is entirely in accord with the statement of the law of Ohio by her Supreme Court. Moneys, credits, investments in bonds, stocks, etc., are all qualified in 2731 by the words "of persons residing in this state." In *Grant* v. *Jones* (39 Ohio St., 506), the taxation of "credits" was at issue, which, of course, involved exactly the same question as the taxation of "investments in bonds." The syllabus (which under the rule of that court is the language of the whole court) reads:

> "Credits owned by a non-resident of this state *are not* taxable *here*, unless they are *held* within the state by a guardian, trustee or agent of the owner *by whom they must be returned for taxation.*"

In the opinion in that case the unimportance of the location of the paper evidence of a credit in determining the question whether it is taxed under the law of Ohio, and the necessity of a resident owner or holder to give the credit a taxing situs, are further accentuated. The court say (p. 514):

> "Whenever the person holding such choses in action resides in Ohio, he must list for taxation such credits, whether he holds them as owner, guardian, trustee or agent. If they are held within the state in either capacity, they are then within the jurisdiction of the state for the purposes of taxation. If they are not so

held but are owned and held by non-residents, they are not subject to taxation."

It was insisted by counsel for the defendant below that even if the bonds are not taxed under Sections 2730 and 2731, *supra*, they are taxed under Sections 2744 and 2746, *supra*, Revised Statutes of Ohio. Their contention, it may be remarked, is in accord with the utterances of Judge Lurton in the Halliday case (*ante*).

The sections referred to in so far as they concern the discussion, read as follows:

> "Section 2744. (Corporations generally; their returns.) The president, secretary and principal accounting officer of every * * * insurance company, * * * or other joint stock company, except banking or other corporations whose taxation is specifically provided for, for whatever purpose they may have been created, whether incorporated by any law of this state or not, shall list for taxation, verified by the oath of the persons so listing, all the personal property which shall be held to include all such real estate as is necessary to the daily operations of the company, moneys and credits of such company or corporation within the state, at the actual value in money, in manner following: in all cases returns shall be made to the several auditors of the respective counties where such property may be situated, together with a statement of the amount of said property which is situated in each township, village, city or ward therein. The value of all movable property shall be added to the stationary and fixed property and real estate, and apportioned to such wards, cities, villages, or townships, pro rata, in proportion to the value of the real estate and fixed property in said ward, city, village, or township, and all property so listed shall be subject to and pay the same taxes as other property listed in such ward, city, village, or township. * * * Provided, that nothing in this section shall be so construed as to tax any stock or interest in any joint stock company held by the state."
>
> "Section 2746. (In whose name property to be listed; but stock in companies which make return of capital not to be listed by shareholder.) Personal property of every description, moneys and credits, investments in bonds, stocks, joint stock companies or

> otherwise, shall be listed in the name of the person who was the owner thereof on the day preceding the second Monday of April in each year; but no person shall be required to list for taxation any share or shares of the capital stock of any company, the capital stock of which is taxed in the name of such company."

Section 2731 is found in the first chapter of the title of the Revised Statutes of Ohio devoted to the subject of Taxation. The subject of the chapter is "Definitions, and property to be taxed." Sections 2744 and 2746 are to be found in the second chapter of the same title, the subject of which is "Listing personal property."

The Supreme Court of the state in *Chisholm* v. *Shields, Treasurer* (67 Ohio St., 374-377), describes Section 2731 as a mere "declaratory section," not sufficient by itself to tax any of the classes of property enumerated therein. The following Sections (those contained in Chapter 2) "carry this declaratory section into execution, and prescribe the manner in which taxation is to be imposed upon property therein specified, and property not so specified in any section is not taxed."

The sections of Chapter 2 show, as is well known, that the system of taxation of personal property in Ohio involves in every instance its return by some *person*. Taxes are not charged against the property itself, but against the person whose duty it is to return it. To put it another way, in no case is personal property taxed directly, but some person or corporation is taxed with respect of property owned, or held for others in some representative capacity. No machinery is provided for placing upon the tax duplicate personal property, either tangible or intangible, except as against some person, and the auditor's right to enforce taxes upon property evading taxation are confined to the correction of the returns made by the persons whose duty it was to return the property for taxation, by inserting in those returns the property which should have been included therein (Rev. Stat. Ohio, Section 2781*a*).

The sections contained in Chapter 2 are not intended to enlarge the scope of Section 2731 by adding new classes of property to those declared to be taxed in that section. They merely provide, when, where, how and by whom property declared taxed by Section 2731 shall be returned for taxation. For the purpose of facilitating returns and reaching property broad rules are laid down and in some instances returns of "personal property" are required to contain real estate, etc., as in case of railroads. But these rules are all for the regulation of returns. The only property taxed is the property enumerated in Section 2731, in the light of which the sections of Chapter 2 must be read.

For instance, in Section 2744, which provides for returns for taxation of corporations, their officers are required to list the personal property of the corporation "which shall be held to include all moneys and credits of such company or corporation within the state." The meaning of the word "credits" as here used is clearly the same as its meaning in Sections 2730 and 2731. The "credits" must be in the state in the sense that they are owned or controlled by some person or corporation in the state; otherwise the state would be applying to its corporations a different rule of taxation from that applied to other citizens, and such construction would be in direct conflict with Section 4 of Article XIII, of the Ohio Constitution, which provides:

> "The property of corporations, now existing or hereafter created, shall forever be subject to taxation, *the same as property of individuals.*"

The construction of Section 2744 applied by Judge Lurton ignores this clause of the Constitution entirely. The property of individuals which shall be taxed is enumerated in Section 2731, and the duty of returning such property for taxation both as to individuals and corporations is contained in Section 2734. The learned judge goes upon the theory that even if the term "personal property" as used in Section 2731 is not broad enough

to include these bonds, the same term used in Section 2744 is broad enough, and that if Section 2734 must necessarily be construed with Section 2731, Section 2744 need not be, because, as he read it, it enlarges the meaning of the term "personal property."

This is in direct conflict with *Lander* v. *Burke* (65 Ohio St., 532), where it was held (p. 542) that Section 2744 *must be* construed in the light of the provisions of Section 2731. Therefore, even granting that the words "personal property" in Section 2744 taken alone *are* broad enough to include "investments in bonds" and to require their return by officers of corporations if the instruments themselves are in the state, we have still, under the authority of *Lander* v. *Burke*, to look to Sections 2730 and 2731 to find when they are in the state, for the purposes of taxation, viz., whether they are *owned or held by persons residing in this state*. Under the definitions of Sections 2730 and 2731, if they are not so owned or held, they are not in the state, and are, therefore, not directed to be returned by the use of the words "personal property" in Section 2744.

Much stress is laid, in Judge Lurton's opinion, upon the fact that these bonds constitute a part of the "capital stock" of the company *invested in Ohio*, and that they should, therefore, be returned under Section 2744, Revised Statutes of Ohio, because "personal property" includes "capital stock" "so far as such capital stock is invested in the state."

The suggestion carries no force because it begs the question. To characterize the bonds as "capital stock" in no degree changes their status as taxable property, because the controlling question remains, "are they capital stock invested in the state?" If the bonds are tangible property and in Ohio, they are taxable as such without the aid of the suggestion that they may also be regarded as a part of the "capital stock of the company." If, on the other hand, the bonds can be considered only as intangible property under the laws of Ohio, then they are not in Ohio

unless owned or held by a person or corporation within the state. And if they are so owned or held they are taxable as "investments in bonds" whether they be considered as "capital stock" or not. If they are not so owned or held they are not in Ohio within the meaning of the tax laws, and, consequently, even if viewed as capital stock, they are not capital stock invested in Ohio.

There is nothing in the case of *Hubbard* v. *Brush* (61 Ohio St., 252), which conflicts with this view, although that case is quoted against it. The facts were as follows: A number of Ohio citizens had taken a corporate charter from the state of West Virginia. They had no offices in West Virginia and transacted no business in that state. Their principal office was located in Ohio and their entire business there transacted. Their officers and agents lived in Ohio and there managed all the affairs and assets of the company. The property sought to be taxed was book accounts, etc.—credits—intangible property—admittedly incapable of a separate situs under Ohio tax laws. The corporation contended that the situs of these choses in action was in the state which created the corporation, upon the theory that the owner (the corporation) could only dwell in that state. The contention of the taxing officer was, not that these credits were *tangible* property in Ohio (the contention here) but that they were held, operated and controlled in the state by persons residing in the state, and, therefore, were intangible property with a situs here for taxation.

In deciding the case the Supreme Court is careful not to disturb the construction of the law for taxing intangible property announced in *Grant* v. *Jones*, *Worthington* v. *Sebastian*, *Payne* v. *Watterson*, *Myers* v. *Seaberger* (*supra*) and other cases.

In deciding that the property was properly taxed in Ohio they carefully qualify their language (p. 264):

"We hold, therefore, that the provisions of Section 2744, which make it the duty of foreign incorporations to list for taxation in this state their choses in action, *where they are held within this state* and grow out of the business they conduct herein, is a valid exercise of the taxing powers vested in the state."

It was because they were held in the state that they were taxable, not because the books in which the balances appeared on the paper on which the notes were written happened to be in the state.

But again, a consideration of Section 2744 from another point of view leads to the conclusion that it has no application to foreign insurance companies. The returns of corporate property generally are provided for in two sections, 2734 and 2744. Section 2744 is limited by its terms to the returns of all corporations "except banking or other corporations whose taxation is specifically provided for." It is followed by Section 2745, which reads as follows:

"Section 2745. (Returns by foreign insurance companies.) Every agency of an insurance company, incorporated by the authority of any other state or government, shall return to the auditor of each county in which such company does business, or from which it collects premiums, on or before the first day of May, annually, the amount of the gross premium receipts of such agency for the previous calendar year in such counties; provided, however, that in the case of regular companies, wherein policy holders participate in the surplus and earnings of the company, dividends or surplus from previous payments allowed and used in the payment of current premiums, cancellation or surrender values, and commissions paid to the citizens of this state, during the same period, for which receipts are reported, shall be deducted from such gross receipts, and the net amount after such deduction shall be the basis of taxation for such companies in the counties, which shall be entered upon the tax list of the proper county, and the subject to the same rate of taxation, for all purposes, that other personal property is subject to at the place where located; * * * And it shall be the duty of the Superintendent of Insurance,

in the month of December, annually, to charge and collect from all such companies such sum as, added to the sum paid to the county treasuries, will produce an amount equal to two and one-half per cent. on the gross premium receipts of such companies, as shown by their annual statements, under oath, to the insurance department; * * * All taxes collected under the provisions of this section by the Superintendent of Insurance shall be paid by him, upon the warrant of the auditor, into the general revenue fund of the state."

Prior to the year 1850, banking, insurance and bridge companies incorporated under the laws of Ohio paid as taxes five per cent. of the dividends made by such companies within the year. Foreign insurance companies were taxed six per cent. of the amount of profit on premiums earned during the year. Neither class of corporations appear to have been taxed in any other way.

(See Chase's Statutes, pp. 1820-1821).

After the adoption of the constitution of 1851 the whole scheme of taxation was revised in an Act passed by the Legislature on April 13, 1852. Section 21 of this Act (50 Ohio Laws, 145) contained in a single paragraph the substance of Sections 2744 and 2715, the second proviso of Section 21 being the first form in which Section 2745 appeared. The entire section was as follows:

"Section 21. The president, secretary or principal accounting officer of every canal or slackwater navigation company, railroad company, turnpike or plank road company, bridge company, insurance company, telegraph company, or other joint stock company, *except banking or other corporations whose taxation is specifically provided for in this act*, for whatever purpose they may have been created, whether incorporated by any law of this state or not, shall list for taxation, at its actual value, its real and personal property, moneys and credits, within this state, in manner following: In all cases return shall be made to the several auditors of the respective counties where such property may be situated, together with a statement of the amount of said property which is situated in each township, town, city, or ward therein. The value of all movable property shall

be added to the stationary and fixed property and real estate, and apportioned to such wards, towns, cities, and townships, *pro rata*, in proportion to the value of the real estate and fixed property in said ward, town, city, or township. And all property so listed shall be subject to, and pay the same taxes as other property listed in such ward, town, city or township. It shall be the duty of the accounting officer aforesaid, to make return to the auditor of state, during the month of May, of each year, of the aggregate amount of all property, real and personal, by him returned, as required by the provisions of this act, to the several auditors of the respective counties in which the same may be located. If the county auditor, to whom the returns are made, is of the opinion that false or incorrect valuations have been made, or that the property of the corporation or association has not been listed at its full value, or that it has not been listed in the location it properly belongs, or in cases where no return has been made to the county auditor, he is hereby required to proceed to have the same valued and assessed in the same manner as is prescribed in the several sections of this act, regulating the duties of county auditors; provided, that nothing in this section shall be so construed as to tax any stock or interest in any joint stock company held by the state of Ohio; *provided, that every agency of an insurance company incorporated by the authority of any other state or government, shall return to the auditor of the county in which the office or agency of such company may be kept, in the month of May, annually, the amount of the gross receipts of such agency, which shall be entered upon the tax list of the proper county, and subject to the same rate of taxation for all purposes, that other personal property is subject to at the place where located.*"

From that time until the revision of 1880 unimportant amendments were added.

The only corporations whose taxation seems to have been specifically provided for in this Act of April 13, 1852, and to which, therefore, the language italicized in the first part of Section 21 could be held to apply were banking companies (50 Ohio L., 144), the Ohio Life Insurance & Trust Company (50 Ohio L., 146) and foreign insurance companies (50 Ohio L., 146) to which latter companies the second proviso of Section 21 was

addressed. The language "except banking or other corporations whose taxation is specifically provided for in this Act" must be held to include foreign insurance companies, as otherwise the plural expression "other coporations" would be confined not merely to a single class of corporations, but to a single corporation, viz., The Ohio Life Insurance & Trust Company.

In the Revision of 1880, Section 21 of the Act of April 13, 1852, was merely divided into the two sections, Nos. 2744 and 2745, which still remain the same, with some amendments which do not apply here.

What was the effect of the second proviso of Section 21 of the Act of April 13, 1852, which is now Section 2745?

The Legislature might have said: "*Provided that in addition to the tax hereinabove provided for, every agency of an insurance company, etc.,*" or it might have said "Provided that in lieu of the tax hereinabove *provided to be paid by corporations generally, foreign insurance companies shall be taxed as follows.*" Such aid is not given and we are left to the usual guides to ascertain the legislative intent.

A "proviso" in a statute is defined in Dwarris on Statutes (p. 514) as "something engrafted upon a preceding enactment, and (it) is legitimately used, for the purpose of taking special cases out of the general enactments and providing specially for them (citing 9 B. & C., 35)."

In *Minis* v. *U. S.* (15 Pet., 423, at 445), Justice Story used the following language in defining the operation of a proviso (p. 445):

> "The office of a proviso, generally, is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the Legislature to be brought within its purview."

In re Webb (24 How. Pr., 247-249), in construing an act regulating enlistment of minors, the court say:

> "The office of a proviso is not to enlarge or extend the act, or the section of which it is a part, but rather put a limitation and a restraint upon the language which the law maker has employed."

Boon v. *Juliet* (2 Ill., 258):

> "A proviso in a statute is intended to qualify what is affirmed in the body of the act, section or paragraph preceding it."

In *Walsh* v. *Van Horn* (22 Ill. App., 170):

> "It is the office of a proviso in a statute to limit the body of an act or antecedent clauses."

In the Circuit Court the Halliday case was heard before Judge Thompson, who delivered in all, three opinions. In his first opinion (which is unreported) he held that the effect of Section 2745 was to exclude foreign insurance companies from the operation of Section 2744, and that therefore there was no tax upon their property in the state. He afterwards reopened the case and asked counsel to reargue this proposition:—

Granting that Section 2745 excludes these companies from the operation of Section 2744, is their property within the state not taxed under the last clause of Section 2734, which provides for the return of property "of every company, firm or corporation by the president or principal accounting officer, partner or agent thereof."

Thereafter he decided (110 Fed. Rep., 259), that the bonds were taxed under Section 2731 and should be returned for taxation under Section 2734, either by the officers of the company or by the Superintendent of Insurance as a trustee.

After another reargument, he delivered the opinion reported in 127 Fed. Rep., 830. He there held that the bonds were returnable under Section 2744, notwithstanding the language of the original proviso, now Section 2745. This last view was sub-

stantially adopted by Judge Lurton, who also declined to decide whether the return should have been made by the company's officers or by the Superintendent of Insurance.

In view of this evident uncertainty on the part of the learned judges who considered the Halliday case, as to under what section and by whom these bonds should have been returned for taxation, upon their theory that they are taxed, it becomes especially important to examine these sections, and to ascertain their meaning. As Judge Lurton says, the sections are all to be read together. They are all parts of one act of the Legislature, putting into operation a general system of taxation, and there should be found in them neither inconsistencies nor contradictions.

Section 2734 declares: "Who shall list personal property." It covers the entire field in general terms. Among its other provisions is that return shall be made of the property of "every company, firm or corporation by the president or principal accounting officer, partner or agent thereof."

Sections 2744 directs more specifically how the returns of corporations shall be made. The section does not in any way change the provisions of Section 2734. Returns are to be made by the president, secretary and principal accounting officer, thus placing this duty upon the same class of officers already selected by Section 2734. But the section supplements Section 2734 by further providing in what form the returns shall be made, and upon a careful reading of the section the need of something more than the general language of Section 2734 and which the Legislature obviously intended to supply by Section 2744, is at once clear. Certain classes of corporations such as navigation railroad, telegraph, bridge companies and the like owned large amounts of property, difficult to classify and locate, and which might entirely escape under the general language of Section 2734. Telegraph wires and poles were affixed to realty, so were cross-ties, rails, switches and sim-

ilar property. Cars and canal boats were here to-day and away to-morrow. To avoid differences and confusion between realty and personalty, the section provides that "personal property shall include all such real estate as is necessary to the daily operations of the company." To cover the case of movable chattels the section provides that their gross value shall be apportioned among the various taxing districts in which the company owning them pays taxes on real estate or fixed property. Moneys and credits are also provided for, but are incidental to the evident purpose of the act.

There still remained foreign insurance companies. Here was a class of corporations doing business in the state and deriving a large revenue therefrom who generally owned no real estate, and needed no personalty in the state of a tangible nature in the conduct of their business. They acted entirely through agents, who furnished their own offices and sent their principals the proceeds daily, weekly or monthly. Under the provisions suitable for navigation companies, railroads, etc. (the present Section 2744) they might entirely escape taxation. Therefore, they were withdrawn from the operation of those provisions, and a new and distinct method of taxation was applied by the language of the proviso now contained in Section 2745. This puts upon their agencies in the state the duty of returning for taxation, in the various taxing districts, the gross premiums received by them during the year, as so much personal property to be taxed like other personal property in the same district.

There is, therefore, nothing inconsistent in these laws. Section 2734 construed with Section 2731 is intended to cover the entire returns of corporate property as well as all other property in the state. Section 2744 supplements that section in regard to corporations by specifically providing for the return of certain property which might not be returned under the general language of Section 2734; and Section 2745 provides for a revenue from a class of corporations which could not

be reached by Section 2744, by requiring them to return their gross yearly income as so much property.

It is urged that Section 2745 provides for a tax on business, that our position would amount to a substitution of a tax on business for a tax on property which would thereby become exempt from taxation, and that this, even if intended by the Legislature, would be unconstitutional. The result does not follow. It is clear that Section 2744 does not affect the return of ordinary property of foreign insurance companies, but any property in the state owned by them which should be taxed under Section 2731 must be returned for taxation under the provisions of Section 2734 by the "president, principal accounting officer or agent thereof."

In view of the authorities quoted, it is plain that the State of Ohio in her system of taxation has elected to consider investments in bonds as intangible property, and that an effort to tax them as tangible property is opposed to the clear meaning of her laws and the express decisions of her Supreme Court.

It remains to be considered whether these bonds are held by some person in the state in some such capacity as would bring him within the law requiring from him their return for taxation. If they are so held, they are properly taxable in Ohio at the place of residence of such person. In the language of the Supreme Court of Ohio, in *Grant* v. *Jones* (39 Ohio St., 306):

> "If they are not so held, but are owned and held by non-residents, they are not subject to taxation."

The bill alleges in substance that these bonds are the property of complainant below, whose home office is in Edinburg, Scotland, and whose chief office is in the United States, from which it conducts all its business in Ohio, is Hartford, Conn.; and that they are registered in the name of the Superintendent of Insurance of the State of Ohio for the use and benefit of the policy-holders in Ohio. The bill further alleges that the com-

pany has no general office in the state of Ohio. All of these facts are admitted by the demurrer. The only person, therefore, who could possibly furnish a taxing situs for the bonds would be the Superintendent of Insurance considered as a trustee. If he is a *trustee* and *holds* them, in the sense in which these words tion under Section 2734. If he is not a *trustee* in the sense the word is used in Section 2734, or if he does not *hold* them in the sense the word is used in Section 2730, then the bonds have no situs in Ohio and are not taxed there.

The meaning to be attached to the word "held" in Section 2730, which specifies investments in bonds *of* persons residing in this state, "whether *held* for themselves or others," has been adjudicated in *Myers* v. *Seaberger* (45 Ohio St., 232), and by the U. S. Circuit Court in *Walker* v. *Jack* (79 Fed. Rep., 138). In these cases the courts held that mere possession of the evidence of a chose in action, or a *qualified* authority with reference thereto, does not constitute a *holding* in the sense the word is used in these statutes. The court in *Myers* v. *Seaberger* (45 Ohio St., 232, at p. 236) calls attention to the fact that:

> "Any other construction would require every attorney in the state engaged in making collections for non-residents, to return the same for taxation. Such could not have been the intention of the Legislature, nor does the language of the statute require that such construction should be placed on it."

In deciding the case of *Walker* v. *Jack*, the U. S. Circuit Court say (p. 140):

> "If we refer to the definition of the word '*hold*,' we find that, as given by Anderson in his Law Dictionary, it means 'possessed by lawful title,' as, 'hold,' a 'note' or 'bond; * * * In *Witsell* v. *Charleston*, 7 S. C., 99, it was decided that, 'as the technical term, 'hold' embraces two ideas,—that of actual possession of some subject or dominion of property, and that of being invested with legal title or right to hold or claim such possession.' A similar ruling was made in *Hurst* v. *Hurst*, 7 W. Va., 297."

The Circuit Court of Hamilton County, in *Sims* v. *Best*, (*supra*), in speaking of bonds deposited under precisely similar circumstances with the Treasurer of State, say of that officer:

> "He has no right or control over these bonds, and not a particle of interest in them either as to principal or interest except as an officer of the state and as the custodian of them. * * * The law does not contemplate, in the least, that any kind of ownership or title to these bonds should rest in the Treasurer of State."

In the case at bar the facts are identical with the case last referred to. The bonds are controlled from the office of the company in Hartford, Conn. The Superintendent is a mere custodian and has no power or authority over them or their proceeds. He can not, under the statute, subject them to any claim against the company. That must be done by the person holding such claim by proper proceedings instituted in that behalf and neither permission nor co-operation is necessary on the part of the Superintendent. It is clear, therefore, under these authorities that the Superintendent of Insurance does not *hold* these bonds in the sense necessary to give them a situs in Ohio for taxation, under Section 2731.

It is equally clear from an examination of the authorities that he is not a "trustee" of the bonds in the sense the words are used in Section 2734, Rev. Stat. Ohio.

In *McNeill* v. *Hagerty* (51 Ohio St., 255), the meaning of the word "trustee" as used in Section 2734 is discussed by the court. In that case an assignee for the benefit of creditors was sought to be taxed upon the funds in his hands.

The court say (p. 266):

> "It is, however, urged that the clause of Section 2734 which requires that the property of every person for whose benefit property is held in trust must be listed by the trustee, furnishes authority for requiring such listing by an assignee of an insolvent. It is true that, in a general, broad sense, an assignee is a trustee,

and, in other sections of the Revised Statutes, the terms 'assignee' and 'trustee' are coupled as though the words mean the same.

"But it does not follow that the term 'trustee' is used in this broad sense in this clause of the statute, for equally, in the same sense, is a guardian or administrator, or a receiver, a trustee, and if the term had been intended in so broad a sense as to include assignees of insolvents, it would also embrace the other trustees named, and the special provisions regarding them would be superfluous. We think the purpose of this clause is fully satisfied by confining its application to that large class of trusts where title and possession are placed in one for the benefit of others *in some permanent form, and from which, in general, interest income or profit is expected to be derived.*"

In that case the assignee was merely *holding* the assets for the benefit of creditors and awaiting order of distribution.

In *French, Treasurer,* v. *Bobe, Assignee* (64 Ohio St., 323), this question of taxing an assignee as a trustee again came before the same court. There, Bobe, the assignee, *had obtained an order to continue the operation of the business, and was operating it for the benefit of creditors and assignor.*

On p. 341, the court say:

"The rule of law applied to the McNeill case has no application to the present case. In substance, and in all essential particulars, the position of the assignee in this case is much like that of a receiver. He is clothed with the legal title to the property of which he has possession (which can not be said as to a receiver), but in no other particular is there any real difference. He has held, and is holding, the property, not for the purpose of sale and distribution, *but for the purpose* of operating the same for profit. * * * As a receiver, if directed by the court, manages the property in the interest of creditors, so this assignee manages under the order of court for the benefit of creditors; * * * As a general rule, it may be stated that there is no sound principle upon which the property of a person or corporation in the hands of a receiver *to be managed* for the interests of those concerned, can be regarded as exempt from the burden of taxation."

In the closing lines of the opinion, the court refers to the "spirit of the requirement of Section 2734," meaning thereby that the managing for profit by one, of assets belonging to others, affixes a duty upon the resident operator to return the assets for taxation.

The court held that there is no magic in names. The same official, be he assignee, or trustee, or receiver, would under certain circumstances be taxed, whereas under other circumstances he would not be taxed.

From a comparison of these two decisions, the conclusion is inevitable that the state intends to tax assets belonging to non-residents but being operated by some resident in Ohio in the expectation of deriving a benefit from that operation for the absent *cestui que trust*. To put it differently, if the resident of Ohio is managing the funds or assets in his hands so that such property has *an independent value in his hands, as distinguished from the value of the credit in the hands of the creditor, then, and not otherwise, is it to be listed for taxation.*

We have no such circumstances here. The superintendent holds these bonds as a *pledge*. Call him a trustee, if you will, but he has no more power to *deal* with the bonds than an assignee holding assets awaiting an order of distribution (the McNeill case). He can not sell them or exchange them. He can not even collect the interest on them. His whole duty is to hold them until such time as by law they may be subjected to the claims of unpaid policy-holders; and then his duty, as defined in *State, ex rel*, v. *Matthews* (64 Ohio St., 419), is to distribute "the funds so deposited with him *pro rata* among the several policy-holders, and when their just claims shall all be satisfied, to pay the balance, if any, to the company"—the very relation to a fund which the Supreme Court in the McNeill case (*supra*) says does not contemplate a "return for taxation" within the "spirit" of Ohio tax laws.

This precise question was also adjudicated in *Sims* v. *Best* (*supra*). Speaking of bonds deposited with the Treasurer of State by a corporation, under precisely similar circumstances to those of the case at bar, the court said:

> "We are clearly of the opinion that the bonds required by law to be deposited with the Treasurer of State, do not in any sense constitute him a trustee or owner in any sense. He has no right or control over these bonds, and not a particle of interest in them as as to principle or interest except as an officer of the state and as the custodian of them."

There are no Ohio authorities to the contrary.

If the bonds deposited with Treasurer of State, the taxation of which was the subject of litigation in the case of *Sims* v. *Best et al*, were tangible property, they were admittedly in Columbus and should have been taxed there. If they were intangible property, and the state officer was a trustee whose duty it was to return them, they still should have been taxed there. The court refused to tax them in Franklin county upon either theory, and held that they were intangible property whose taxing situs was the home office of the company. In that case the home office was in Hamilton county. In this case it is admittedly outside of the state. The reasoning of the court applies equally to both cases, and, we submit, concludes the discussion.

The case at bar depends upon the construction to be placed upon Ohio statutes. Authorities elsewhere are instructive only in so far as the statutes they construe resemble the Ohio statutes. Several outside authorities were quoted by Lurton, J., in the Halliday case, and some consideration of them would seem proper. One of these is *People* v. *Home Insurance Company* (29 Cal., 534). The California statute required a deposit of bonds by foreign insurance companies with some bank within the state as a condition precedent to doing business in California. In that case the Home Insurance Company through

its managing agents, who resided in California, deposited bonds with Wells, Fargo & Co., bankers, in compliance with the law of the state. The case is entirely different from the case at bar and the decision proceeds upon the theory that the bonds were under the control of an agent of the company residing in the state. The court say (p. 544):

> "In the case now under consideration, the securities *are* separated from the owner and his domicile, and in the hands of an agent in this state and in the character of property."

The bonds were not assessed against Wells, Fargo & Co., who held them, but against the managing agents of the company, who resided in the state but did not have possession of the bonds.

Furthermore, the California statute is very different from the Ohio Statute (Stat. 1859, p. 345, Sec. 2). It reads (p. 547, report, *supra*):

> "Every person, corporation, etc., owning, etc., or having possession, charge, or control of * * * any personal property situate, or being within the county, shall deliver to the city and county assessor, etc., a statement of all * * * personal property, etc., owned, etc., or which is in the *possession* or under the control of such person, firm, etc."

The Ohio statute reads:

> "Section 2734. * * * Every person of full age and sound mind shall list the personal property of which he is the owner, and all moneys in his possession, all moneys invested, loaned *or otherwise controlled* by him, as agent or attorney, or on account of any other person or persons, company or corporation whatsoever, etc."

The court said (p. 548):

> "Where it is not in the hands of the owner, it is usually held by someone else, under some agency or trust, and the statutes which have been referred to are comprehensive enough to reach it in most cases when

actually situated here, notwithstanding the foreign domicile of the owner.

"All personal property within the state is liable to taxation. *It may be within the state in the possession or under the control of a trustee, while the beneficial owner is a resident abroad; and in such case the assessment is to be against the person having the special interest or control. The actual* situs *and control* of the property *within the state is the condition which subjects it to taxation.* The owner will of course be assessed if he resides here and has it under his control; *if he resides in another state, the result is reached by charging his agent or trustee in actual possession.*"

Thus they hold in effect that any kind of an agent, so he have *possession* of the property, may be charged with the duty of listing it. This view of the California law differs from that taken of the Ohio law by the Supreme Court in *Myers* v. *Seaberger*, where it is laid down that mere possession does not constitute an agent in the sense the word is used in the Ohio statute. In the California case there was in fact a managing agent in the state, and the actual point decided, to-wit, the taxation of bonds in the hands of a managing agent, in no way interferes with our position.

The case of *British Com. Life Ins. Co.* v. *Commissioner of Taxes* (28 How. Pr., 41), is to the same effect as the California case. The rule announced in the second syllabus is:

"*The place of assessment* for the purposes of taxation of a *foreign corporation* doing business in this state, is *where the operations of the corporation are carried on, not at the residence of the Comptroller of the State who has charge of the securities deposited by the corporation under the statute.*"

On p. 57, the court say:

"It is objected on the part of appellant that the place of assessment should be where the Comptroller resides, upon the ground that he holds the funds as trustee, and he, and not the company, should be assessed. The property is the property of the company, *held* by them but *deposited* with the Comptroller as

security. It would not be taxable if the company did not carry on business in this state. By the provisions of Rev. Stat., Vol. I, Sec. 1, all lands and all personal estate within this state, whether owned by individuals or by corporations, are made liable to taxation, and by Section 4, debts due on bonds are included under the term personal estate. By I Rev. Stat., p. 908, Section 5, every person is to be assessed in the town or ward where he resides, for the personal estate owned by him, and by Section 6, the personal estate of every incorporated company liable to taxation on its capital shall be assessed in the town or ward where the principal office or place for transacting the financial business is located. * * * The return states that the place of business of the corporation is in the city of New York, which is admitted by the demurrer."

The court thereupon concluded that under these statutes, the *home office*, and not the Comptroller should list.

Catlin v. *Hull*, 21 Vt., 152, which is cited with approval in *People* v. *Home Insurance Co.*, was a case in which credits belonging to a non-resident were being managed, collected and reinvested by a resident agent. The case is on all-fours with *Walker* v. *Jack* (*supra*), and *Hoyt* v. *Commissioner of Taxes* (23 N. Y., 224). In the latter case the court say that "the actual situs *and control* of the property within the state is the condition which subjects it to taxation."

In *People* v. *Home Insurance Company* (*supra*) much stress was laid upon the cases of *Assurance Society* v. *Commissioner* (28 Barb., 318) and *Hoyt* v. *Commissioner* (23 N. Y., 224). Both the New York decisions are based upon an act passed by the Legislature of that state in 1855, which is much broader than any statute in Ohio, and they could be distinguished on that ground. But the doctrine of *Hoyt* v. *Commissioner*, as has already been said, is not disputed, being practically the same as that of *Myers* v. *Seaberger*; and although *Assurance Society* v. *Commissioner*, which was decided in 1858, seems to hold that the Comptroller of the State, for the purpose of effecting taxation, may be considered an

agent having bonds under his control, this was entirely abrogated by the decision of the Court of Appeals of New York in *British Com. Life Ins. Co.* v. *Comptroller*, 31 N. Y., 32, decided in 1865, where the decision of the lower court, quoted from above, to the effect that the comptroller was not such an agent as was required to list for taxation credits deposited with him, was affirmed.

Whatever be the law in New York, the meaning attached to the word "agent" in *Assurance Society* v. *Commissioner* (*supra*) is in direct conflict with the meaning put upon the same word by the Supreme Court of Ohio in *Myers* v. *Seaberger*, and the other decisions of the same court mentioned above.

In none of the statutes considered in the above cases in other states are "investments in bonds" treated as a separate subject of taxation. As bearing upon the construction placed by *Worthington* v. *Sebastian* and *Payne* v. *Watterson* (*supra*) upon the effect of their being specified as a separate class in the Ohio tax laws these authorities are, therefore, of no value.

In bringing to a close our argument upon the question whether these insurance deposits are taxed under the Ohio law, we venture again to criticize the opinion of Judge Lurton in the Halliday case (126 Fed., 257).

The learned judge calls attention to the statutes requiring domestic insurance companies to list their property under Section 2744, and in the same connection, says (p. 265):

> "Such companies are required by Sections 3634, 3637, 3640, Rev. St., 1890-92, to invest their capital stock in certain classes of bonds. If foreign insurance companies are not required to list bonds held by them in the state, neither are such domestic companies."

There is no analogy between the cases, for how can a foreign corporation which, to quote the language of the same judge in the same decision, "can dwell only in the place of its creation," hold property in Ohio except through an agent? And

that no agent holds or controls these bonds is alleged in the bill and admitted by the demurrer. If any one in Ohio holds them, it is not the corporation which owns them but the Superintendent of Insurance, as trustee. But, as we have seen, he is no trustee in the sense the word is used in the tax laws. The domestic insurance companies are required to and do invest their capital in similar securities, but they pay taxes upon them not where the bonds happen to be (which may be in New York, or on deposit in some other state as security for its policy-holders) but at their home office, where their residence is and where they are returned as intangible property, "investments in bonds" held and owned by residents of Ohio. And it would seem logical that the same class of securities belonging to a foreign corporation should be entitled to the same classification and treatment.

The history of Ohio in her treatment of foreign insurance companies does not indicate the intention suggested by Judge Lurton that this deposit is required for the purpose, among others, of enforcing the payment of taxes thereon.

The Supreme Court has said in *State* v. *Reinmund* (45 Ohio St., 214-217), where an attempt was made to so construe Ohio statutes as to impose a large increase of taxation upon a foreign insurance company:

> "This view is in consonance with the recognized policy of this state of long standing, which is to invite, rather than repel, the investment and use here of foreign capital. In this spirit the obvious interest of the state is to encourage the location here of agencies of companies organized in other states, having large experience as insurers and possessed of abundant capital, in order to afford to our people the manifold benefits of the security given by their contracts; and any unnecessary discrimination against those companies would be inconsistent with this enlightened policy, and would tend to injuriously affect our people. The language employed in the sections quoted fails to show any purpose on the part of the Legislature to depart from this well settled policy."

Prior to 1873 foreign insurance companies were required to deposit with the state negotiable notes secured by first mortgage upon Ohio property. No attempt was ever made to tax these notes.

From that date until 1894, the deposits were required to be made in United States bonds, property which the state had no power to tax. From 1894 until the present time the companies could deposit indifferently United States or municipal securities. If the intention was to force the companies to bring one hundred thousand dollars' worth of property into the state which might be taxed, as a condition of doing business, why permit the alternative of non-taxable United States securities, and why, in the statute authorizing the exchange of such bonds for municipal securities, were the taxes upon the latter not made a first lien upon the bonds, as the state is so careful to do in cases of decedents' estates, assignments, etc., instead of having the deposit limited to the use of Ohio policy-holders, and thereby deferring its claim for taxes to the claims of all policy-holders and putting itself on a par with the general creditors of the company? Why was the duty not specifically imposed by the statute, upon the Superintendent of Insurance to return these deposits for taxation?

Why should the state and its officers stand by for six years, knowing from the printed report of its treasurer that these bonds were on deposit, and make no effort to place them upon the duplicate?

And why, finally, when the attempt is made, under a statute passed five years after the amendment permitting the deposit of municipal securities (Section 2781*a*), to collect the taxes for six years—the longest period any of them had been on deposit—did the Legislature put its seal of approval upon the administrative construction of the laws and policy of the state which had been adhered to through the life of two constitutions in Ohio, by amplifying the language of Section 2745, as follows (97 Ohio Laws, 402):

"Insurance companies and associations, incorporated by the authority of another state or government, or the Superintendent of Insurance, shall not be required to make returns of deposits of such companies or associations, made as required by law with such Superintendent of Insurance for the benefit and security of policy-holders, and shall not be governed, in respect to such deposits, by the provisions of Section 2744 or of Section 2734 of the Revised Statutes of Ohio."

II.

Appellant Being a Non-Resident and Absent From the State, no Personal Judgment Can be Rendered Against it for These Taxes.

Besides other relief, the bill prays that defendants be enjoined from prosecuting a civil action now pending in the Common Pleas Court of Franklin County, Ohio, which was brought for the purpose of collecting from the appellant the taxes alleged in the bill to have been assessed against appellant upon the municipal bonds formerly on deposit with the Superintendent of Insurance of the state. The action was brought in accordance with and under the authority given to county treasurers by Section 2859 of the Rev. Stat. of Ohio, which reads as follows:

"Section 2859. (Authority of treasurer; mode of procedure; judgment shall be rendered.) When any personal taxes, heretofore or hereafter levied, shall stand charged against any person, and the same shall not be paid within the time prescribed by law for the payment of such taxes, the treasurer of such county, in addition to any other remedy provided by law for the collection of such personal taxes, is hereby specially authorized and empowered to enforce the collection by a civil action in the name of the treasurer of such county against such person for the recovery of such unpaid taxes; and it shall be sufficient, having made proper parties to the suit, for such treasurer to allege in his bill of particulars or petition that the said taxes stand charged upon the said duplicate of said county

against such person, that the same are due and unpaid, and that such person is indebted in the amount appearing to be due on said duplicate, and such treasurer shall not be required to set forth in his petition any other or further special matter relating thereto, and said tax duplicate shall be received as *prima facie* evidence on the trial of said suit of the amount and the validity of such taxes appearing due and unpaid thereon, and of the non-payment of the same, without setting forth in his bill of particulars or petition any further special matter relating thereto; and if, on the trial of the action, it shall be found that such person is so indebted, judgment shall be rendered in favor of such treasurer so prosecuting such action as in other cases; and the judgment debtor shall not be entitled to the benefit of the laws for stay of execution or exemption of homestead, or any other property, from levy or sale on execution in the enforcement of any such judgment."

The defendant was served by summons upon its agent and is in court. It will be noticed that the civil action provided for in this section is entirely *in personam* and independent of the proceedings in distraint instituted by the Treasurer of Franklin County against the United States bonds on deposit with the Superintendent of Insurance in a further attempt to collect the same taxes. The bringing of this civil action provided for in Section 2859 is an endeavor to charge the non-resident owner with the taxes as for a *debt*.

Our position is that, waiving the question of the validity of the taxes assessed upon the bonds, the state's right to these taxes is nothing more than a *right in rem* against the property taxed. The owner being a non-resident, and outside of the jurisdiction of the state, can not, by any enactment of the state Legislature, be held *in personam* for taxes assessed upon its property which happens to be within the state, although such taxes may appear as a charge against the non-resident personally upon the books of the auditor.

In Judson on Taxation, under the sub-heading of "Juris-

diction of Persons for Taxation," the learned author says (Section 414):

> "But the taxing power of the state over persons obviously depends upon the domicile of the person, as domicile is the test of liability for purely personal taxes." Citing Dicey on Conflict of Laws (A. Ed. 171).

Judge Cooley, in his work on Taxation (p. 24, Third Edition), declares that:

> "Where a non-resident is owner of tangible personal property within the state, and the state imposes taxes upon it, *the tax is not a charge against the owner personally*, but must be enforced against the property itself. *The state has no jurisdiction to assess a tax as a personal charge against non-residents.*"

Upon this branch of the case the decision (Record, pp. 20 and 21) and decree (Record, p. 22) sustain our contention. The question was not considered by the Court of Appeals in the Halliday case the court holding that it was not presented upon the record in that case.

The theory upon which our adversaries attempt to uphold their right to maintain a civil action against appellant, under Section 2859, would seem to be that the "due process of law" guaranteed by the Fourteenth Amendment to the Constitution of the United States, is fulfilled so long as *service of summons* in the action is had in accordance with the state statutes regulating service upon non-residents. They quote Section 5027, Rev. Stat. Ohio ("An action against a non-resident of this state, or a foreign corporation, may be brought in any county in which there is property of or debts owing to the defendant, or where such defendant is found, or where the cause of action or some part thereof arose"), and reading this section, in connection with those providing for service of summons upon agents of foreigns corporations, they say: You have nothing to complain of. In coming into the state to do business you submit

yourselves to our laws. You have been properly served with a summons under those laws, to appear in her courts and to answer a prayer for a personal judgment against you for these taxes. There has been due process of law, and your constitutional rights have been properly protected.

The fallacy lies in overlooking the fundamental difference between antecedent or primary rights, on the one hand, and secondary or remedial rights, on the other. Speaking of this distinction, Holland, in his "Jurisprudence" (p. 124) uses the following language:

> "The nature of the distinction is sufficiently simple. The rights of the owner of a garden not to have it trespassed upon, of a servant to have his wages paid, of a purchaser to have his goods delivered to him, are all of the former kind, viz., rights 'antecedent,' which exist before any wrongful act or omission. They are rights which are given for their own sake. The right of the owner of a garden to get damages from a party of men who have broken into his grounds, of a servant to sue his master for unpaid wages, of a purchaser to get damages from a vendor who refuses to deliver the goods sold, are, on the other hand, of the latter kind, or rights 'remedial'; they are given merely in substitution or compensation for rights antecedent, the exercise of which has been impeded, or which have turned out not to be available.
>
> "If all went smoothly, antecedent, or primary, rights would alone exist. Remedial, or sanctioning, rights are merely part of the machinery provided by the state for the redress of injury done to antecedent rights."

See also,

Pomeroy's Remedies and Remedial Rights, Section 1.

To apply this classification directly to the facts in the case at bar, the State has the right to levy and assess taxes with respect to persons or property within its jurisdiction. This right is primary, and all steps necessary to a valid levy and assessment have to do with *substantive* law. When taxes have once been properly levied and assessed and they are not

paid, a secondary or remedial right belongs to the state, to-wit, the right to collect these taxes by distraint, or attachment, or arrest, or civil action. The rules regulating the enforcement of this right belong to *adjective* law. It is plain that a secondary or remedial right can not arise until a breach of a primary or antecedent right has occurred, and it is equally plain that a *breach* of a primary right can not occur unless there is a primary right to break.

Grant, therefore, that in the civil action, the prosecution of which is sought to be enjoined, the rules of procedure have been complied with, that the defendant has been served with summons, and is properly before the court, the test of "due process of law" has still to be applied to the alleged primary right, for the breach of which the state sues. For before the state can collect a tax from an individual, resident or non-resident, there must be a tax due from the person sought to be personally charged, and without this antecedent right and its correlative duty, an enforced collection is nothing more or less than confiscation, however strictly the method of collection may conform with the adjective law of the state.

These taxes stand upon the auditor's books of Franklin county charged against the appellant personally. The civil action sought to be enjoined is an attempt to enforce their collection by a personal judgment against it. But a state has no right to impose taxes upon a non-resident as a personal liability, and an effort on her part to do so is within the inhibition of the Fourteenth Amendment of the Constitution of the United States, and should be enjoined.

As stated by Mr. Justice Field in *State Tax on Foreign Held Bonds Case* (15 Wall., 300, at 319):

> "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects *within the jurisdiction of the state.* These subjects are persons, property, and business."

The decision of this court in the case of *Dewey* v. *Des* Moines (173 U. S., 193), is in accordance with our position. In that case, the effort was made, under a statute authorizing personal judgment for taxes and assessments against owners of real estate, to hold a non-resident of the state of Iowa personally liable for an assessment made upon real estate owned by him in that state. The non-resident owner had voluntarily come into the courts of the state as a complainant and asked for an injunction against an attempt to hold him personally liable for such assessment.

On page 201 of the report, this court said:

> "It is said that the statute (Code of Iowa, Section 478) provides for the personal liability of the owner of lots in a city in the state of Iowa, to pay the whole tax or assessment levied to pay the cost of a local improvement, and that the same statute provides that the assessment shall also be a lien upon the respective lots from the time of the assessment. It is also said that the statute has been held to be valid by the Iowa Supreme Court. This seems to be true." (Citations.) "The same thing is also held in the opinion of the state court delivered in the case now before us.
>
> "In this case no question arises with regard to the validity of a personal judgment like the one herein against a resident of the state of Iowa, and we therefore express no opinion upon that subject. This plaintiff was at all times a non-resident of that state, and we think that a statute authorizing an assessment to be levied upon property for a local improvement, and imposing upon the lot owner, who is a non-resident of the state, a personal liability to pay such assessment, is a statute which the state has no power to enact, and which can not therefore furnish any foundation for a personal claim against such non-resident. There is no course of reasoning as to the character of an assessment upon lots for a local improvement by which it can be shown that any jurisdiction to collect the assessment personally from a non-resident can exist. The state may provide for the sale of the property upon which the assessment is laid, but it can not under any guise or pretense proceed farther and impose a personal liability upon a non-resident to pay the assessment or any part of it. To enforce an assessment of such a

nature against a non-resident, so far as his personal liability is concerned, would amount to the taking of property without due process of law, and would be a violation of the Federal Constitution.

* * * * * * * * *

"The jurisdiction to tax exists only in regard to persons and property or upon the business done within the state, and such jurisdiction can not be enlarged by reason of a statute which assumes to make a non-resident personally liable to pay a tax of the nature of the one in question. All subjects over which the sovereign power of the state extends are objects of taxation. Cooley on Taxation, 1st. Ed., pp. 3, 4; Burroughs on Taxation, Section 6. The power of the state to tax extends to all objects within the sovereignty of the state. (Per Mr. Justice Clifford, in *Hamilton Company* v. *Massachusetts*, 6 Wall., 632, at 638.) The power to tax is however limited to persons, property and business within the state, and it can not reach the person of a non-resident. State Tax on Foreign-held Bonds, 15 Wall., 300, 319. In Cooley on Taxation, 1st Ed., p. 121, it is said that 'a state can no more subject to its powers a single person or a single article of property whose residence or legal situs is in another state, than it can subject all the citizens or all the property of such other state to its powers.' These are elementary propositions, but they are referred to only for the purpose of pointing out that a statute imposing a personal liability upon a non-resident to pay such an assessment as this oversteps the sovereign power of a state."

The same question was recently considered by the Court of Appeals of New York in the *City of New York* v. *McLean* (170 N. Y., 374, decided April, 1st, 1902). It was held that, while the state had the power to levy a tax upon the personal property of a non-resident, and, for that purpose, to separate the situs of the owner from the actual situs of the property within the state and subject it to taxation because it was within the state limits, yet it could only enforce *payment* of the tax by virtue of its jurisdiction over the property. It had not, by virtue of that jurisdicton, any power to subject a non-resident owner to a personal liability for the tax, *even though personal service be had upon such owner in an action*

to collect. Certain shares of stock in a national bank doing business in New York City, and belonging to a resident of New Jersey, were, as required by law, assessed in New York city in the name of the non-resident owner. The bank failed to pay the taxes so assessed and suit was brought, under a statute similar to Section 2859, Rev. Stat. Ohio, in the New York courts against the non-resident owner for the recovery of a personal judgment for these taxes, and personal service of summons on him was obtained. The case is completely analogous to the case at bar, and is instructive because the state authorities contended, as do the state authorities here, that the defendant was properly in court, personal service having been had upon him, and that, therefore, due process of law had been observed. The court say, in the course of his opinion (p. 383):

> "It must be borne in mind that the real question involved is not the jurisdiction of the Supreme Court over the defendant, but is whether the board of taxes and assessments had such jurisdiction of defendant's person as to authorize it to impose upon him any liability which could be enforced as a personal claim. While it is true that the assessment in question was in form against the defendant personally, still, as the board had no jurisdiction of his person, the effect of the assessment was merely to impose a charge upon the bank shares owned by him and which were within the jurisdiction of the board."

In conclusion the court says (p. 387):

> "Thus, it becomes manifest that, even if the statutes of this state were intended to confer upon the officers of the plaintiff authority to maintain an action against the defendant, and to impose upon him a personal liability for the payment of the tax assessed upon his shares of stock, yet, so far as they attempted to confer that right they were beyond the power of the legislature to enact, and to that extent are invalid. This conclusion is not only fully sustained by authority, but it is also just and in accordance with the principles which lie at the basis of the right of taxation. Taxes, unlike debts, are not contractual, but are enforced contributions levied by the authority of the state

for the support of its government and other public needs. The justification for their demand is based upon the reciprocal duties of protection and support, and the exclusive sovereignty and jurisdiction of the state over persons and property within its territory. The citizen owes to the government the duty to pay taxes, so that the latter may be enabled to perform its functions, and he thus receives his proper compensation in the protection which the government affords to his life, liberty and property. This protection may be either to the rights of persons or the rights of property, and taxes may consequently be imposed upon either when within the jurisdiction of the state. But a personal tax can not be assessed against a non-resident, nor can a tax be assessed against his property, unless it has an actual *situs* within the state, and thus is under the protection of its laws."

It was urged in the court below, and will probably be urged here, that the decision in *Dewey* v. *Des Moines* has been great modified by the decision of this court in *Bristol* v. *Washington County* (177 U. S., 133). This modification was urged by counsel in the McLean case, and the Appellate Division of the Supreme Court of New York has, we believe, answered the suggestion completely in the following quotation from their opinion (57 App. Div. 601, 608):

"It is said, however, that the Supreme Court of the United States has held in the subsequent case of *Bristol* v. *Washington County* (177 U. S., 133), that a non-resident of a state assessed with respect to personal property in that state is personally liable for the tax. * * * The court held that that claim (for taxes) was valid, and that as the state had the right to levy a tax against the property of Mrs. Bristol which was therein situated, that assessment became a valid claim against the property, and for all purposes of administration was a debt which might be collected out of that property by a proper proceeding in that state. But it is to be noticed that the question there was not as to the personal liability of Mrs. Bristol, but as to the liability of her property which was situated in that state, and which by the express provision of the statute of that state was liable to the tax. Although Judge Fuller does say that the tax was a claim against the estate, he

does not say that it was a claim against Mrs. Bristol personally, nor is there anything in the case which could be construed as making any such holding.

"The true rule to be deduced, in my judgment, from all the cases is that, although the state has the power to levy a tax upon personal property of a non-resident situated within its boundaries and subject to its jurisdiction, and for that purpose may separate the situs of the owner from the actul situs of the property within the state, and subject it to taxation because it is within the state, yet it can only enforce payment of that tax by virtue of its jurisdiction over the *property*, and it has not by virtue of that jurisdiction any power to subject the owner of it to a *personal liability* for the tax."

Referring to *Bristol* v. *Washington County* and *Blackstone* v. *Miller*, this court in *Board of Assessors* v. *Comptoir National* (191 U. S., 388, at 403), says:

"From these cases it may be taken as the settled law of this court that there is no inhibition in the Federal Constitution against the right of the state to tax property in the shape of credits where the same are evidenced by notes or obligations held within the state, in the hands of an agent of the owner for the purpose of collection or renewal, with a view to new loans and carrying on such transactions as a permanent business."

In *LaFayette Insurance Company* v. *French* (18 How., 404, at 407), Curtis, J., says:

"A corporation created by Indiana can transact business in Ohio only with the consent, expressed or implied, of the latter state. * * * This consent may be accompanied by such conditions as Ohio may think fit to impose; and these conditions must be deemed valid and effectual by other states and by this court, *provided* they are not repugnant to the Constitution and laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by all others."

Appellant is admittedly a non-resident of Ohio, and is treated as such by the state. The deposit here sought to be

taxed is required because it is a non-resident. The power of the state for taxing purposes upon property found within its jurisdiction is, as we have seen, apparently unlimited, whether it belongs to residents or non-residents; the power of the state to impose conditions upon non-resident corporations desiring to do business within its borders is apparently one to be measured only by the conscience of its Legislature; but the power in each instance stops at the state boundary. The state can refuse a non-resident corporation permission to do business within its territory, or can regulate its admission, or can oust it therefrom as punishment for disobedience to its laws; but there its power over the corporation itself ceases. It can not by a proceeding *in personam*, fasten the duties of citizenship, such as a personal liability for a tax, upon the subject of another sovereign.

III.

THE MUNICIPAL BONDS FORMERLY ON DEPOSIT BEING NO LONGER WITHIN THE STATE, THE TAXES LEVIED WITH RESPECT TO THEM CAN NOT NOW BE COLLECTED BY DISTRAINT OR OTHER PROCEEDING IN REM DIRECTED AGAINST THE COMPLAINANT'S UNITED STATES BONDS NOW DEPOSITED IN THE STATE.

In October, 1900, the auditor of Franklin county entered upon his duplicate against complainant as owner, taxes upon its deposit of municipal bonds for a period of six years, from 1895 to 1900 inclusive.

On November 15, 1900, the treasurer of Franklin county brought a civil action against complainant, under Section 2859, for the taxes so assessed against it. No effort was made by the treasurer to attach or distrain the municipal bonds, which remained on deposit with the Superintendent of Insurance until April 2, 1903.

On that date United States bonds were deposited with the Superintendent of Insurance under the provisions of Section

3660 permitting an exchange, and the municipal bonds were forwarded to complainant at Hartford, Conn., by the Superintendent of Insurance.

A year after the Superintendent had sent the municipal bonds out of the state, a warrant of distraint was issued by the county treasurer, and effort made to seize thereunder the United States securities then on deposit with the Superintendent.

A charge or claim upon the United States securities now on deposit, for the taxes levied with respect to the municipal bonds formerly within the State and for which they were substituted, can only arise in two ways:

First, upon the theory that the non-resident owner is *personally liable* for the taxes assessed against it with respect to the former deposit, so that any property belonging to it and being found within the state may be subjected to the payment of the owner's debt or default.

Secondly, upon the theory that the municipal bonds formerly on deposit were charged with the payment of the taxes and that this charge has in the act of substitution been transferred to the United States securities.

The first theory has been, we believe, dealt with at sufficient length *supra*. If the state has no right to make complainant personally liable by a civil action, neither can it by a proceeding *in rem* directed against complainant's property, enforce the payment of a tax as a personal charge due from it, where the state had no jurisdiction of it personally in levying the tax. The *antecedent* right being lacking, adjective law, either by proceedng *in rem* or *in personam*, is powerless to supply the deficiency; a distress warrant is as futile as a civil action.

The second theory, that these United States bonds have in some way become charged or invested with an impersonal liability for these taxes can not be supported.

Under the laws of Ohio all taxes except those upon real property are assessed against some *person* owning or controlling the property *and not against the property itself.* There is no provision in the statutes for placing personal property belonging to an unknown owner and found within the state upon the tax duplicate, as there is in the case of real estate (R. S., Section 2798).

All the provisions for collecting taxes levied with respect to all classes of personalty are based upon the personal liability therefor of some owner or holder whose duty it was to return the property for taxation.

Section 2859, which gives the treasurer the right to collect by civil action, declares:

> "When any personal taxes, heretofore or hereafter levied, *shall stand charged against any person,* * * * the treasurer * * * is hereby specially authorized and empowered to enforce the collection by a civil action in the name of the treasurer of such county *against such person* for the recovery of such unpaid taxes; * * * and if, on the trial of the action, it shall be found that *such person is so indebted,* judgment shall be rendered, etc."

The law permitting distraint for personal taxes is as follows:

> "Section 1095. (Overdue taxes may be collected by distress.) When taxes are past due and unpaid, * * * the county treasurer, or his deputy, may distrain sufficient goods and chattels *belonging to the person or persons charged with such taxes,* if found within his county, to pay the taxes so remaining due and the costs that have accrued; etc."

The law providing for placing upon the duplicate personal property which has escaped taxation is as follows:

> "Section 2781. (Action of auditor upon false tax return or evasion of return.) *If any person* whose duty it is to list property or make a return thereof for taxation, * * * shall in any year or years make a false return or statement, or shall evade making a re-

turn or statement, the county auditor shall for each year, ascertain as near as practicable, the true amount of personal property, moneys, credits and investments that *such person ought to have returned or listed* * * * and accordingly enter the same on the tax lists in his office, giving a certificate therefor to the county treasurer who shall collect the same as other taxes."

Section 2838, which provides when the lien of the state for taxes shall attach, is as follows:

"Section 2838. (When lien of state for taxes attaches.) The lien of the state for taxes levied for all purposes, in each year, shall attach to all real property subject to such taxes, on the day preceding the second Monday of April, annually, and shall continue until such taxes, with any penalty which shall accrue thereon, shall be paid; all personal property subject to taxation shall be liable to be seized and sold for taxes; and the personal property of any deceased person shall be liable, in the hands of any executor or administrator for any tax due on the same by any testator or intestate."

This section was construed in *Spence, Assignee,* v. *Frye, Treasurer* (2 Weekly Law Gazette, 103). In that case the court decided that taxes are not a lien in Ohio upon the personal property of the person against whom they are assessed *until actually seized and distrained by the treasurer;* that a person can dispose of all his personal property at any time before actual distraint, free of all lien, or claim for taxes.

The same section was construed by the Jefferson County Probate Court in *Citizens Bank Assignment* (2 Western Law Monthly, 121). The court says:,

"This liability of personal property to be seized and sold *does not constitute a lien on the property.* The Legislature have made a clear distinction between real and personal property here, and in doing so have only followed the uniform course of legislation and the well established principle of law respecting liens upon these two kinds of property. A judgment becomes a lien upon lands without levy, but a judgment does not become a lien on personal property until it be seized

in execution. * * * A lien on personal property is the right to retain it in possession until some charge upon it is paid. Possession of the goods is always necessary to create a lien, and possession is necessary to continue it." Citing Lord Mansfield, Ch., J., 4 Burr., 222; *Kirkham* v. *Shullcross*, 6 T. R. 14; *Rushforth* v. *Hadfield*, 6 East. Rep., 519; 7 East. Rep., 224; 2 Kent, 638; 1 East., 4; *Jordan* v. *James*, 5 Ohio, 98.

It may be urged that Article XII, Section 2, of the Constitution requires all personal property to be taxed, and that Section 2731 has declared that:

> "All property whether real or personal in this state, and whether belonging to individuals or corporations * * * shall be subject to taxation, etc.,"

and therefore that these bonds, if they are tangible personal property, are taxed, in the sense that they are charged by that section with the duty of paying the taxes assessed with respect to them.

The Ohio Supreme Court has construed the effect of Section 2731 to be otherwise in *Chisholm* v. *Shields, Treasurer*, 67 O. S., 374. The court say (p. 377):

> "Section 2 of Article XII of the Constitution imposes upon the General Assembly the duty of passing laws taxing all property at its true value in money, with certain named exceptions. Under this section the General Assembly has enacted our tax laws, and has made a general provision in Section 2731 that 'all property, real or personal, in this state, and whether belonging to individuals or corporations; and all moneys, credits, investments in bonds, stocks, or otherwise, of persons residing in this state' shall be taxed, etc.
>
> "It is claimed by counsel for defendant in error, that this legacy is an investment in an annuity, and being of the same general class as credits, investments in bonds and stocks, that it is included within the word '*otherwise*,' that all property must be taxed, and that as this legacy is property, it must also be taxed. But this section is only the declaratory section, and subsequent sections, especially 2736, 2737 and 2739 carry this declaratory section into execution, and prescribe the manner in which taxation is to be imposed upon

> property therein specified; and property not so specified in any section, is not taxed; as for instance, investments in life insurance policies are not taxed, for the reason that no statute authorizes their taxation, although thousands, if not millions of dollars are invested in them, many being fully paid up, and others having a surrender value. Such policies are clearly property, and very valuable property at that, but not taxed, because no statute specifically requires their taxation. The same is true of many other valuable investments. So that the word '*otherwise*' in Section 2731 includes only such property or investments as are specifically mentioned and required to be taxed in the subsequent sections, and property or investments not so mentioned can not be taxed. And in so specifically mentioning and requiring to be taxed, the property must be such as is ordinarily included in the description given, and not such as can be brought within the description by a process of reasoning only, or by a strained construction. The General Assembly must be presumed to be able to fairly describe such property as it desires to tax, without resorting to a strained construction, or a course of fine reasoning."

The sections referred to by Judge Burket in that case as actually taxing property, are every one of them directed to the return of personal property, tangible as well as intangible, by some holder or owner who is to be personally charged with the tax in whatever capacity he may be required to make a return.

In view of the law as construed in these decisions, and this construction has never been questioned, it follows that Ohio has elected to make personal liability of some one the basis for the collection of all taxes levied with respect to personalty; and here there is and never has been any person liable for these taxes. It also follows that since the municipal bonds were not taxed or charged with the payment of taxes by ny step or proceeding, they left the state free of all liability for taxes, and there was no lien or incumbrance thereon to be transferred to the United States bonds substituted for them.

This court in *New Orleans* v. *Stempel* (175 U. S., 309, at 312), Mr. Justice Brewer, delivering the opinion, says:

> "Of course, there must be statutory warrant for such taxation, for if the Legislature omits any property from the list of taxables the courts are not authorized to correct the omission and adjudge the omitted property to be subject to taxation."

It is equally obvious that if the state has placed no charge upon personalty for taxes levied with respect to it, but has chosen to charge and hold either the owner of the property or some person upon whom is placed the duty to return the same for taxation, such omission (if it be an omission and not a design), is one which the courts are not authorized to correct, and such property must remain entirely free from liability or charge until such time as by the laws of the state it *is* charged with a liability, to-wit, when actually seized under a warrant of distraint or other process as the property *of some one who is personally liable for a tax thereon.*

A fortiori property substituted for the property with respect to which it was sought to assess taxes, where the substitution lawfully takes place before any proceeding against the original property, does not become liable to seizure for such taxes.

The court below sustains the right of the county treasurer to seize these United States bonds under a distress warrant, and examination of the grounds stated in the decision is therefore necessary.

In the first place, the court (Record, p. 18) assumes it to be an admitted fact that the municipal bonds originally on deposit were subject to taxation in Ohio. This has never been admitted by appellant and is one of the questions this court is now asked to determine.

But suppose the bonds *were* subject to taxation, is the court helped in its conclusion?

The learned Judge says (Record, 19):

> "These government bonds now on deposit are not being taxed, they are not subject to taxation, but an attempt is made to appropriate them to the pay-

ment of taxes which were properly levied upon other bonds, for which these bonds were substituted."

Again, he says:

> "Ordinarily the substitution of certain property, for other property means that it shall stand in the place of and represent the other for all purposes."

Therefore, the court argues, since the former bonds were liable for these taxes, those that were substituted for them are now liable for them.

But the former bonds were never charged with the payment of any tax. If we assume that they could have been so charged by being seized under some process for collection, still, this was never done, and, as we have seen, without this there is no lien or charge for taxes upon personal property in Ohio for taxes unpaid by the owner or holder. So the assumption of the learned Judge and his conclusion based thereon are equally erroneous.

Again he says (Record, p. 19):

> "Now, in order to sustain the complainant's position, the court would be required to construe this statute (Sec. 3660) to mean that the statute deliberately provided that the insurance company *might escape the obligation imposed upon it* to pay these taxes, at any time it saw fit, by simply withdrawing the original bonds deposited and replacing them with other bonds."

There *is* no obligation imposed upon complainant, a non-resident, to pay these taxes. The state has no right *in personam* So the learned Judge himself determined in the same opinion, and in consequence of that determination denied the right of the county treasurer to recover a judgment for the taxes in a civil action. To seek to hold the bonds now on deposit, because they belong to the same owner whose bonds were formerly on deposit, for a supposed personal liability of that owner to pay the taxes levied in respect for the former deposit, is but another way of making the non-resident owner personally liable for the payment of taxes, which the state is powerless to do.

The learned Judge calls to his aid the provisions of Section 3660. He says (Record, pp. 19, 20):

> "It seems to me that this must be held to have been the understanding between the parties here, the state and the insurance company; that the state in granting this license to do business in this state provided that these bonds might be replaced by other bonds, upon the condition that the substituted bonds should in every way take place of the original bonds, and that the state did not intend to relinquish or surrender any rights which it had, under the deposit of the original bonds.
>
> "These bonds, when deposited, were held by the superintendent of insurance, not only to insure compliance with the provisions of the law protecting policy holders, but to insure compliance with the tax laws of the state. It provides that so long as the company so depositing continues solvent and complies with the laws of this state, it shall be permitted by the superintendent of insurance to collect interest and dividends on such deposit, implying that at any time, if the state should be in doubt as to its solvency, it may not only hold the bonds, but hold the interest and dividends to satisfy the claims of the policy holders, and, necessarily, the just claims of the state."

And again:

> "There is nothing in this law exempting as property the bonds of the original deposit from taxation. The company was bound to know that they would be subject to taxation and that, to their full value, they would be made available for the payment of any taxes which the state might lay upon them."

The clause in Section 3660, which the court relies on, is parenthetical in its nature, and reads as follows:

> "So long as the company so depositing continues solvent and complies with the laws of this state, it shall be permitted by the superintendent to collect the interest or dividends on such deposits."

The section forms a part of Title II of the Revised Statutes of Ohio, the whole of which title is devoted to the creation and regulation of corporations. From the location of the section in the statutes, the "laws" referred to would naturally

mean the various regulations and conditions under which companies of the class complainant belongs to are permitted by the state to do business within her borders. The taxation of property of insurance companies is not included in this title, being in Part I of the Revised Statutes. A fair reading of the statute would indicate that the real object of the clause is to enable the superintendent to retain the interest and dividends where there is any doubt of the solvency of the depositor, and that the possible liability of such interest and dividends for obligations for taxes was not within the intent of the Legislature. This more clearly appears by a perusal of the rest of the statute. The deposit is therein limited to be "for the benefit and security of policy holders residing in this state." There is no provision in the law that the principal sum shall be held for any other purpose, and under the law, when a company withdraws from the state, the superintendent of insurance, upon being satisfied that there are no *policy obligations* outstanding in the hands of citizens of the state, is required immediately to release the deposit. If the intention of the Legislature was such as is ascribed to it by the learned Judge in the court below it is fair to assume that the release of these securities would not have been authorized until a further showing that the obligation for taxes due the state or any county thereof had been fully satisfied.

Suppose, for the sake of argument, that the learned Judge is correct in his statement—that the bonds are on deposit to insure compliance with the tax laws of the state; that the company was bound to know the bonds formerly on deposit were subject to taxation; and that to their full value these bonds would be available for the payment of any taxes the state might levy with respect to the former bonds. Do these suppositions assist in determining the validity of an attempt to distrain the other securities now on deposit? Among the laws, which the complainant was bound to know, on the assumption made, was that the state had power to tax bonds found within

her borders, but no power to impose a personal obligation for these taxes upon a non-resident. It was further bound to know that Ohio, by her laws, had elected not to tax personalty as such, until it was actually seized.

If there had been a seizure of the municipal securities by the proper officers and afterwards a substitution for them of these United States bonds the case might possibly have been different. There would have been a lien—a charge upon the specific property seized, and by the act of substitution it might be claimed that the lien or charge was in some way transferred to the property substituted.

But that is not the case at bar. The complainant, which was under no personal liability for taxes, received back from the superintendent its bonds with no lien or charge thereon for taxes. The state stood by and contented itself with bringing a civil action against complainant, instead of seizing the bonds themselves and thereby fixing an actual charge upon them.

Wherein has the company failed to comply with the tax laws of Ohio? In not returning the property? The property was not owned or held within the state, and if Section 2744 be construed as undertaking to require non-resident corporations to perform such duty, which necessarily imposes personal liability, it is to that extent void.

The state of Ohio might have, as did the state of Minnesota, in the statute construed by this court in *Bristol* v. *Washington County* (177 U. S., 133), provided that taxes levied with respect to the personal property of non-residents shall be a lien upon *all* the property of such non-residents in the state. Such a law is entirely within the power of a state to pass, and such a lien would undoubtedly attach to the bonds formerly on deposit belonging to complainant and all the rest of complainant's personal property in the state. But the state of Ohio has elected not to do this, and even if this were an oversight it is not within the province of the courts to supply the defect.

IV.

THE MUNICIPAL BONDS BELONGING TO COMPLAINANT FORMERLY ON DEPOSIT IN COLUMBUS HAVING BEEN REMOVED FROM THE STATE ON APRIL 2D, 1903, ELEVEN DAYS PRIOR TO THE DAY PRECEDING THE SECOND MONDAY IN APRIL OF SAID YEAR (APRIL 13TH), NO TAXES CAN BE ASSESSED WITH REFERENCE TO SUCH BONDS FOR THE YEAR BEGINNING APRIL 13TH, 1903, OR ANY PART THEREOF.

Section 2736, Revised Statutes of Ohio, provides that each person required to list property for taxation shall annually, upon receiving a blank for that purpose, make out and deliver to the assessor, verified by oath, a list of the personal property, moneys, credits, investments in bonds, etc., in his possession or under his control on the day preceding the second Monday in April of that year. In the year 1903, the day preceding the second Monday of April was the 13th of the month. These bonds having been removed from the state on April 2d, 1903, the court below decided that they were not subject to taxes for the year beginning April 13, 1903, or any part of the same.

The contention of our opponents is that the bonds should be taxed for a pro rata proportion of the year, under a provision contained in Section 2737, Revised Statutes of Ohio. This provision is as follows:

> "Such statement" (referring to the list of property required to be made out by the person taxed, verified by his oath, etc., as required by law) "shall truly and distinctly set forth * * *; sixteenth, the monthly average amount or value, for the time he held or controlled the same, within the preceding year, of all moneys, credits, or other effects, within that time invested in, or converted into bonds or other securities of the United States or of this state, not taxed, to the extent he may hold or control such bonds or securities on said day preceding the second Monday of April; and any indebtedness created in the purchase of such bonds or securities shall not be deducted from the credits under the fourteenth item of this section."

The construction of this section was involved in the decision of *Shotwell* v. *Moore*, 129 U. S., 590. The constitutionality of the section had been attacked upon the ground that it indirectly placed a tax upon United States securities. In the majority opinion of this court the reason for the legislation is stated on page 598 as being to prevent the evasion of taxes, made possible by the facility with which negotiable securities and other rights and credits liable to taxation may be exchanged for greenbacks at the time the assessment is made and afterwards replaced in the form in which they had been previously.

The facts of the case at bar show that for a period of years certain securities, supposed theretofore to be non-taxable, were openly on deposit with a state officer at Columbus; that for five years no effort was made to assess a tax against them; that when an effort was finally made by the taxing officers, their right to lay the tax was disputed, and litigation ensued; and that after an adverse decision by a lower court in another case the complainant openly and in due form exercised its prerogative of removing from the state of Ohio the bonds in question, and at the same time substituted for them other securities which were unquestionably non-taxable. There was and is no evasion or trick to defeat the tax laws, but the substitution was an honest election by a non-resident owner to take out of the state securities which it had placed there under the belief that they were non-taxable, and to substitute therefor securities as to the taxability of which there could be no question thereafter. Its right to make this withdrawal and substitution is not questioned, and the total absence of trick or subterfuge or evasion is apparent from the mere statement of facts.

The case at bar, then, does not present a state of facts calling for the application of the law as interpreted by its *spirit* or purpose as they were defined in the above case.

It remains to be discussed whether the case falls within the *letter* of the statute, so as to call for its application irrespective of the motives of the parties.

As appears from the allegations of the bill, the government bonds sought to be distrained, and now on deposit with the superintendent of insurance, were and are not the result of a conversion of the municipal bonds previously on deposit, but were simply substituted for the municipal bonds which were then withdrawn from deposit and removed from the state. The municipal bonds were not sold and the proceeds thereof used to purchase the government bonds. Such a transaction was impossible, even had it been contemplated, the statutory duty of the superintendent of insurance being to retain possession of the first deposit, in his capacity as trustee, until the interests of his *cestuis que trustent* had been protected by the actual deposit with him of the securities which were to take the place of those to be withdrawn. In point of fact, the substituted securities were deposited with the superintendent of insurance before he released the former deposit. There was not, therefore, in fact or in law, either any conversion of the municipal bonds into the government bonds, or any investment of the former in the latter.

The exact language of the statute is that the statement of the person required to list property shall contain—

> "the monthly average amount or value, for the time he held or controlled the same, within the preceding year, of all moneys, credits, and other effects within that time *invested in or converted into* bonds or other securities of the United States or of this state," etc.

The meaning of the verb to "invest," as given in the Century Dictionary, is to "convert into some other form of wealth, usually of a more or less permanent nature, as in the purchase of property or shares, or in loans secured by mortgage," etc. The definition of the verb to "convert," as given by the same authority, is "to change or turn, as into another form or substance; or to change into an equivalent thing; transmute; transform; as to convert grain into spirits; to convert one kind of property into another; to convert bank notes into gold."

It is true that in a limited sense it might be said that the *deposit* of municipal bonds has been changed into a *deposit* of United States bonds; but it can not be said that the one set of bonds has been *converted* into the other set. The municipal bonds were not exchanged into, but for the United States bonds. The plaintiff, prior to effecting the substitution, purchased the United States bonds with assets possessed by it, which were entirely separate from and independent of the municipal bonds, and which assets were not then, and never were, in the State of Ohio. Other assets, whatever they were—bank notes or gold or silver—were converted into or invested in the United States bonds, and these were then substituted for the municipal bonds. The latter were then, by their non-resident owner, taken out of the state. Such substitution does not fall within either the letter or the spirit of said statute, which plainly contemplates an act whereby an owner turns one species of property which is taxable into property which is not taxable, thereby divesting himself of the taxable property; in other words, an ordinary sale or exchange. The case at bar presents an instance in which the owner of both taxable and non-taxable property substituted the non-taxable for the taxable without any change in his legal title to either species of property and without any conversion or investment of one into the other.

It is submitted that neither the spirit nor the letter of Section 2737, Revised Statutes of Ohio, authorized the taxation of the bonds which had been removed, for any portion of the taxing year beginning April 13, 1903.

CONCLUSION.

For these reasons we ask that the decree below be affirmed as to the non-liability of complainant to a personal judgment for the taxes claimed, and as to the non-taxability of the bonds for any part of the year 1903. And we ask for a reversal of

the decree in so far as it held the municipal bonds liable to taxation while on deposit, and in so far as it upheld the right of the state officers to seize for taxes upon such bonds the United States bonds now on deposit in their stead.

As we have shown, the settled construction of the laws by the state authorities for a long period of years was that deposits of this kind were not taxed. That policy has been repeated and confirmed by the legislative declaration above given, that they shall not hereafter be taxed. And it is unjust to the complainant now to have the burden of taxes imposed upon it, all at once, for the long period during which no steps were taken by the State looking to the taxation of bonds in its own possession, at the end of which the sharpened optics of the tax inquisitor showed him a way which does not exist to collect these eight years' taxes in one.

Respectfully submitted,

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Cincinnati, December, 1904.